

## RECENT CASES

**Admiralty—Jurisdiction of High Court—Damage by British Ship to Foreign Wharf**—Action in rem was brought against the owners of a British vessel for damage done to a wharf in South Africa through negligent navigation of the vessel. Vessel owners contended High Court<sup>1</sup> had no jurisdiction. *Held*, the High Court has jurisdiction. *The Tolten* [1946] P. 135.

Though the factual situation of trespass on foreign land has been before the High Court on the propriety of a common law action<sup>2</sup> (in which jurisdiction was denied), there has been no similar case raised on the possibility of an admiralty action.<sup>3</sup> The British rule of maritime jurisdiction is that the High Court shall have jurisdiction in any claim for damages by a ship,<sup>4</sup> and this is directly opposed to the common law doctrine expressed in the *Mocambique*<sup>5</sup> case. This case, however, involved an invasion of land rights in which the owner was ejected from his property and sued in personam to recover for the trespass. Even if the application of the *Mocambique* case would bar a suit in personam, the very nature of admiralty law is so different from that of the common law that it would be incompatible with the general law of the sea and English admiralty statutes to bar an action in rem in the instant case. The American courts have reached the opposite conclusion, but for different reasons: since our maritime jurisdiction does not extend to damage by vessels to land structures.<sup>6</sup> This principle is well defined in the United States<sup>7</sup> and has been established by a long line of cases,<sup>8</sup> all of which refuse to grant jurisdiction for damages to land structures, whether in the United States or abroad. The American rule, however, has been vigorously criticized as

1. "This was a court which exercised jurisdiction in prize cases, and had general jurisdiction in maritime causes, on the instance side." BLACK, LAW DICTIONARY (2d ed. 1910) 286. The present jurisdiction of the High Court of Justice in relation to admiralty matters is derived partly from statute, and partly from the inherent and statutory jurisdiction of the High Court of Admiralty. See Supreme Court of Judicature Act, 15 & 16 GEO. V, c. 49, § 22 (1925).

2. *British South Africa v. Companhia de Mocambique* [1893] A. C. 602, 10 The Times L. R. 7. In this case, however, the House of Lords was concerned not with an admiralty action *in rem* against the ship, but with an ordinary common-law action for breaking and entering the plaintiff's lands, for ejecting the plaintiff therefrom and for damages for such trespass. Still less was it considering the application of this rule to maritime liens.

3. In *The Moxham* [1875] P. D. 43, 106, a similar situation arose but there was an agreement between the parties to determine liability in an English court, and the question of whether the foreign court had jurisdiction was eliminated.

4. See Admiralty Court Act, 1861, 24 & 25 VICT. c. 7, reenacted in the Judicature Act of 1925 (15 & 16 GEO. V, c. 22), which states, "The High Court shall have jurisdiction in any claim for damage by a ship."

5. *British South Africa v. Companhia de Mocambique* [1893] A. C. 602.

6. For limitations of admiralty jurisdiction in the United States, see (1917) 65 U. OF PA. L. REV. 298, which deals with jurisdiction in tort cases; for matters of exclusive jurisdiction in admiralty courts, see (1925) 73 U. OF PA. L. REV. 288. Of value, also, are ROBINSON, ON ADMIRALTY (1939) 56; and I BENEDICT, THE LAW OF AMERICAN ADMIRALTY (6th ed. 1940) 349.

7. *The Nootka Sound No. 305-G*, 51 F. Supp. 544 (1943), where the court expresses the American view saying, "A Federal District Court is without admiralty jurisdiction of libel in rem against steamship for damage to libellant's dock as result of such vessel negligently colliding with the dock."

8. The general outline and American view was first set out in *The Plymouth*, 3 Wall. 20 (1865). Here a vessel negligently caught fire and the fire spread to the adjacent wharf. *Held*, no admiralty jurisdiction since the consummation of the injury was on land. This was followed in *Ex Parte Phenix Ins. Co.*, 118 U. S. 610 (1866),

unsatisfactory, and attempts have been made to change it by legislation.<sup>9</sup> In England, where the scope of maritime jurisdiction is much broader than that of the United States, it covers all damages done by a ship.<sup>10</sup> Had the damage been done to a foreign ship in foreign waters<sup>11</sup> or had the land structure been on English soil,<sup>12</sup> there is no question but that the High Court would have had jurisdiction. The chief problem here is whether the accident occurring on foreign soil removes it from the scope of the admiralty courts. If jurisdiction must be limited to Nigeria, plaintiff loses his remedy once the ship has left that country. The principle underlying the general law of the sea has been to protect maritime commerce.<sup>13</sup> In order to secure prudent navigation, persons whose property is damaged by the negligent navigation of a vessel should not be deprived of the security of the vessel. The American rule fails since owners of "land structures" often find their property damaged by vessels, yet no means of recovery except in civil courts. Damages to piers and other waterfront property by ships occur frequently, yet the suit in rem, making the offending ship a security for the damage, is closed to these property owners. If the vessel is under a compulsory pilot, as is the custom when docking or sailing, there can not even be a recovery in personam against

where the same conclusion was reached for damage to shore property caused by sparks from a steamer. Since then, this doctrine has been rigidly followed, being relaxed only to the extent of allowing maritime jurisdiction in cases of damage to aids to navigation, such as beacons fixed in the ground but standing in the water. *The Blackheath*, 195 U. S. 361 (1904). The strict rule of refusing jurisdiction has been followed in *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388 (1886) (jib boom of schooner punching hole in warehouse wall causing corn to flow out into water); *The Troy*, 208 U. S. 321 (1908); and *Cleveland Terminal and Valley R. Co. v. Cleveland Steamship Co.*, 208 U. S. 316 (1908), where ship damaged railroad bridge. See also *Phoenix Construction Co. v. Steamer Poughkeepsie*, 212 U. S. 558 (1908) (damage to pipe on bottom of the river); *United States v. Panoil*, 266 U. S. 433 (1925) (damage to dike extending from shore); *The Vizcaya*, 38 F. Supp. 1020 (1941) (damage to pier attached to land), in all of which cases maritime jurisdiction was refused.

9. BENEDICT, *THE LAW OF AMERICAN ADMIRALTY* 353, makes the following comment, "There has been much discontent with the American rule and bills approved by the American Bar Association (Resolution of American Bar Assoc. at Kansas City, 1937) and the Maritime Law Association (Resolution of the Maritime Law Assoc., May, 1938) have been presented to Congress with the idea of extending the admiralty jurisdiction to all damage done on land by ships." See also *Franum, Ambiguous Torts* (1933) 43 *YALE L. J.* 34.

10. The language of the statute (15 & 16 *Geo. V.*, c. 49) has been expressed in many cases, including those where the wrong doing ship is not herself in collision, *The Dunlossit*, [1897] A. C. 97; "The gist of the matter seems to be a tort done by the ship." *The Sarah*, [1862] *Lush* 549. It has been held to apply to damage to an oyster bed, *The Swift*, [1901] P. 168; to a landing stage, *The Veritas*, [1901] P. 304. The records of the High Court of Admiralty show that suits have been entertained for collisions with a house, a wharf, a bridge, and a dredger. See *ROSCOE AND ROBERTSON, MARSDEN'S COLLISION AT SEA* (6th ed. 1910) 77.

11. *The Griefswald* [1859] *Sw.* 430; *The Russia*, 21 *L. T.* 440 (1869). For a case in which jurisdiction was allowed even when the collision was between foreign vessels in foreign waters, see *The Courier*, [1862] *Lush* 541. Even where proceedings in the same matter are pending before a foreign tribunal, the court may still exercise its jurisdiction. *The Charlotte*, 23 *T. L. R.* 750 (1907).

12. *The Veritas*, [1901] P. 304; *River Wear Commissioners v. Adamson*, 26 *W. R.* 217 (*H. L.* 1877); *G. W. Ry. v. S. S. Mostyn*, [1928] A. C. 57. By the Harbors, Docks and Piers Act, 1847 (10 *VICT.* 27), the owner of every vessel was made answerable for damage done by that vessel to the dock pier.

13. An American case, *The Wildwood*, 41 *F. Supp.* 956 (1946) (affirmed in 133 *F.* (2d) 765) points this out when Judge Neterer traced admiralty law "as being predicated on the law of merchants."

the ship's owner.<sup>14</sup> Nor are suits against the pilots fruitful. The British rule goes further in allowing admiralty recovery in all these cases, and this positive principle of automatic attachment to the ship by the creditor has become a substantive rule of admiralty, more so than the negative principle of common law on which the *Mocambique* rule rests.

**Adoption—Parent and Child—Definition of Parent—Plaintiff** married visibly-pregnant woman two days after her divorce from former husband. A child born four months later was accepted and supported by plaintiff as his own. He also designated this child and his wife life insurance beneficiaries and provided monthly allotments for their support while he was overseas in military service. Learning that his wife had permitted child to be adopted during his absence, plaintiff brought bill of review to nullify adoption decree on grounds that plaintiff, as child's father, had not consented to adoption proceedings as required by Texas statute.<sup>1</sup> Trial court, without the aid of jury, denied relief and found that plaintiff was not child's father. On appeal, *held*, affirmed. Until overcome by legal and competent evidence, presumption that husband of a woman at time of conception of a child is father of such a child, must prevail over presumption that husband at time of birth is child's father. *Burtis v. Weiser*, 195 S. W. (2d) 841 (Tex. Civ. App. 1946).<sup>2</sup>

Firmly rooted in the common law is the judicial policy of ascribing the birth of children to a legitimate source wherever possible.<sup>3</sup> Following such policy, courts have frequently indulged either of two rebuttable presumptions: one, protecting the legitimacy of children conceived in lawful wedlock,<sup>4</sup> the other, protecting children born in lawful wedlock.<sup>5</sup> In the present case the child was conceived while her mother was lawfully wedded to one man and born during her mother's lawful marriage to a second husband. It is evident, therefore, that the legitimacy of this child would be presumptively protected, under the law, regardless of which husband is found to be its father. With the question of legitimacy thus safely resolved, it would logically seem that the occasion for applying such pre-

14. *Homer Ramsdale Co. v. La Compagnie Generale Transatlantique*, 182 U. S. 406 (1901), Note (1936) 15 HARV. L. REV. 405. The same argument is stated by Ernest Bruncher, *Traditions and Common Sense in Admiralty* (1929) 14 MARQ. L. REV. 16.

1. 1 TEX. ANN. REV. CIV. STAT. (Vernon, Supp. 1946) Art. 46a, § 6, provides in part, "No adoption shall be permitted except with the written consent of the living parents of the child. . . . In case of a child not born in lawful wedlock, the consent of the father shall not be necessary."

2. Application for writ of error was denied by the Supreme Court of the State of Texas, October 2, 1946.

3. See LONG, DOMESTIC RELATIONS (3d ed. 1923) § 252, p. 421; 3 R. C. L. 726. It was a maxim of the Roman law, copied by the Common law, that by presumption he is the father whom the marriage indicates, *pater est quem nuptiae demonstrant*. The idea is neatly expressed in 1 BL. COMM. \*446, "A legitimate child is he that is born in lawful wedlock or within a competent time thereafter."

4. This presumption is ordinarily considered to arise in cases where the child is born after the death or divorce of the father and before the mother has remarried. See *Powell v. State ex rel. Fowler*, 84 Ohio St. 165, 95 N. E. 660 (1911); Com. *ex rel. Moska v. Moska*, 107 Pa. Super. 72, 162 Atl. 343 (1932).

5. This presumption is generally employed in cases where the mother was unmarried at time of conception but did become lawfully wedded before the child's birth. See *Reynolds v. Reynolds*, 3 Allen 605 (Mass. 1862); *Kleinert v. Ehlers*, 38 Pa. 439 (1861); *Pinkard v. Pinkard*, 252 S. W. 265 (Tex. Civ. App. 1923). See Anno. 8 A. L. R. 427 and cases cited there.

sumptions disappears.<sup>6</sup> However, the appellate court, apparently motivated by concerns of public morality,<sup>7</sup> felt constrained to base their decision upon a choice between presumptions. It is somewhat surprising, then, that this court overlooked a line of cases which holds that a man who marries a woman he knows to be pregnant is *conclusively* presumed to be father of the child thereafter born from such pregnancy.<sup>8</sup> The Texas court, it is submitted, might well have examined other pertinent considerations, *e. g.*, the result reached in three other cases deciding the question of fatherhood under circumstances parallel to the instant case. These found the second husband to be the legal parent, primarily, on grounds that he had nurtured and supported the child as his own and believed it to be such, precisely what the instant plaintiff had done.<sup>9</sup> Likewise pertinent is the construction to be placed upon the statutory requirement of "consent of the living parents"<sup>10</sup> for adoption. Depending upon the jurisdiction and the context in which it was employed, the term *parent* in statutes has received a wide variety of judicial interpretations, ranging from the literal definition of "one who has generated a child as father or mother"<sup>11</sup> to a very liberal construction which encompasses persons standing in *loco parentis*.<sup>12</sup> Although adoption statutes, being in derogation of the common law, are generally given strict construction,<sup>13</sup> it is, nevertheless, important

6. See *Vulgamore v. Heirs of Vulgamore*, 7 Ohio App. 374, 377-80 (1916).

7. See instant case at 843, where the court said, "This presumption is in accordance with the innocence of all parties. To indulge in a presumption that Thomas R. Burtis (plaintiff) is the father of said child would be to convict the mother of such child of wrong doing, as well as the appellant, who was, at the time of said conception, legally married to another woman."

8. *Bailey v. Boyd*, 59 Ind. 292 (1877); *State v. Shoemaker*, 62 Iowa 343, 17 N. W. 589 (1883); *State v. Romaine*, 58 Iowa 48, 11 N. W. 721 (1882); *Miller v. Anderson*, 43 Ohio St. 473, 3 N. E. 605 (1885); *cf. Roth v. Jacobs*, 21 Ohio St. 646 (1871).

9. *Zachman v. Zachman*, 201 Ill. 380, 66 N. E. 256 (1903); *Bower v. Graham*, 285 Mo. 151, 225 S. W. 978 (1920); *Vulgamore v. Heirs of Vulgamore*, 7 Ohio App. 374 (1916). In each of these cases the child was conceived during its mother's first marriage and born after her second marriage (15 days, 5 months and 17 days afterwards, respectively), but held to be legitimate offspring of the second husband for purposes of inheritance. No cases were discovered which involved adoption of a child born under such unusual circumstances.

10. See note 1 *supra*.

11. *Coakley's Case*, 216 Mass. 71, 102 N. E. 930 (1913); see *McDonald v. Texas Employers' Ins. Ass'n*, 267 S. W. 1074, 1075 (Tex. Civ. App. 1925) (Both of these cases involved payment of damages for employee's death under Workmen's Compensation Statutes.). See (1938) 52 HARV. L. REV. 515.

12. *Faber v. Industrial Commission*, 352 Ill. 115, 185 N. E. 255 (1933) (recovery under Workmen's Compensation Statute); *Saunders v. Alvino and Laserre*, 52 Tex. Civ. App. 356, 113 S. W. 992 (1908) (sister standing in *loco parentis* permitted to maintain suit, as if parent, for damages from illegal sale of liquor to minor brother); *Booth v. Van Allen*, 7 Phila. 401 (1870), wherein the court said, "The strict legal signification of the term parents is the lawful father and mother of a child, but it may be questioned whether it does not mean more than this in the act of 1855, empowering the court to make a decree of adoption with the consent of the parents of an infant, and whether the word ought not to be taken to mean those who stand in the relation of father and mother to the infant."

13. *Gardner v. Hall*, 133 N. J. Eq. 287, 31 A. (2d) 805 (1943), affirming 132 N. J. Eq. 64, 26 A. (2d) 799 (The words "parent" and "surviving parent" as used in section 9 of adoption statute were construed to refer to natural parents only and not to adoptive parents.); *Fisher v. Robison*, 329 Pa. 305, 198 Atl. 81 (1938) (Mother of boy adopted by his step-father with her consent, held not to be one of boy's "adoptive relatives" within terms of statute establishing right to inherit from an adopted person.); *Harle v. Harle*, 109 Texas 214, 166 S. W. 674 (1918) (descendants of adopted child permitted to inherit in same manner as those of natural child). A minority of jurisdictions do not construe adoption statutes strictly: *In re Zupancis' Heirship*, 107

to consider whether the plaintiff, if not the natural father of the child in question, is still such a *parent* as the Texas legislature intended to protect by requiring consent for adoption. It is not inconceivable that the legislature, had they foreseen this particular problem, might have intended the term "parents" to include one who behaved toward the child in the manner of the present plaintiff. However, the decision here implies that plaintiff acquired no rights whatever in the child. Then query, whether following this decision, the United States might succeed in an action to recover from plaintiff its contribution to the child's monthly support allotments. And query, further, whether Texas, adhering to this case, might permit a child, born after artificial insemination of its mother, to be adopted without the consent of the mother's husband, who had accepted and cared for such child as his own.<sup>14</sup> In the light of all these circumstances, it is felt that the court's moralistic approach denied the plaintiff adequate consideration of his rights.

**Attorney and Client—Unauthorized Practice of Law—Administrative Tribunals—**Defendant, a person not licensed to practice law, appeared in and conducted a proceeding before the Nebraska State Railway Commission in which he was not a party but was acting only as the representative of the real party in interest. Although the Commission was an administrative body authorized by the legislature to make its own procedural rules, the proceeding before it was nevertheless conducted largely in the manner of a trial in a court of general jurisdiction.<sup>1</sup> In an action brought on behalf of the State against the defendant it was *held* (two judges dissenting) that defendant was guilty of a contempt of court since his activity in the conduct of the proceeding involved a need of legal training, knowledge, and skill, and therefore constituted the unauthorized practice of law. *State ex rel. Johnson v. Childe*, 23 N. W. (2d) 720 (Neb. 1946).<sup>2</sup>

It is the general rule in the United States that the power to define and regulate the practice of law and to punish its unauthorized practice is inherent in the judiciary.<sup>3</sup> The reason for this proposition as stated

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Colo. 323, 111 P. (2d) 1063 (1942) (Where validity of adoption decree was assailed on procedural grounds, court said it would recognize modern tendency to give adoptive statutes a liberal construction to effect their beneficial purpose and promote welfare of the adopted child.); *Adoption of Alley*, 234 Iowa 931, 14 N. W. (2d) 742 (1944) (Father's consent to adoption of children by mother's second husband held unnecessary where father contributed nothing to their support after divorce and mother had sole custody.).

14. See Schock, *The Legal Status of the Semi-Adopted* (1942) 46 DICK. L. REV. 271-80, for excellent analysis of problems arising from artificial insemination.

1. Questions as to the admissibility of evidence, the qualifications of witnesses, and the bearing of the evidence upon the issue presented played a prominent part in the hearing at various stages of the proceeding.

2. The case was previously before the Supreme Court of Nebraska on a motion of the State for judgment on the pleadings: 139 Neb. 91, 295 N. W. 381 (1941).

3. *Bessemer Bar Ass'n v. Fitzpatrick*, 239 Ala. 663, 196 So. 733 (1940); *People ex rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N. E. (2d) 941 (1937); *People ex rel. Courtney v. Assoc. of Real Estate Taxpayers of Ill.*, 354 Ill. 102, 187 N. E. 823 (1933); *Lowell Bar Ass'n et al. v. Loeb et al.*, 315 Mass. 176, 52 N. E. (2d) 27 (1943); *State ex rel. Wright v. Hinckle et al.*, 137 Neb. 735, 291 N. W. 68 (1940); *State v. Kirk*, 133 Neb. 625, 276 N. W. 380 (1937); *In re Integration of the Neb. State Bar Ass'n*, 133 Neb. 283, 275 N. W. 265 (1937); *State ex rel. Wright v.*

is largely historical,<sup>4</sup> but it finds some logical support in the separation of powers doctrine incorporated into practically all of our constitutions,<sup>5</sup> in that each department of government has, without any express grant, the inherent right to accomplish all objects naturally within the orbit of that department if not expressly limited by the constitution.<sup>6</sup> Attorneys-at-law are officers of the court, and therefore in accordance with the above principle the court has the power to determine their qualifications and punish intruders who come before it.<sup>7</sup> This can hardly be gainsaid. However, the courts go further: it is also generally held that the character of the act done and not the place where it is performed determines whether or not it constitutes the practice of law.<sup>8</sup> It is difficult to see from what source the courts derive such a broad power as this rule implies.<sup>9</sup> Under it, almost any activity, if only remotely connected with the law, could be defined as its practice and the offender punished for contempt if he were not a member of the bar, whether or not the activity came within the purview of any court. Since it is the province of the legislature and not of the courts to define crimes and impose penalties, it would seem that as a matter of strict logic the courts should have no jurisdiction, without specific legislative authority, to punish those who never come inside their doors and who by their activities on the outside never affect the course or conduct of the courts' business. An administrative body is no part of the judicial system except that for certain purposes its rulings may be subject to judicial review.<sup>10</sup> Its functions are delegated to it by the legis-

Barlow, 131 Neb. 294, 268 N. W. 95 (1936); *R. I. Bar Ass'n et al. v. Automobile Service Ass'n et al.*, 55 R. I. 122, 179 Atl. 139 (1935); *Grievance Committee of the State Bar of Texas, 21st Cong. Dist. v. Dean*, 190 S. W. (2d) 126 (Tex. 1945).

4. See cases cited *supra* note 3, esp. *R. I. Bar Ass'n et al. v. Automobile Service Ass'n et al.*, 55 R. I. 122, 179 Atl. 139 (1935).

5. See *Clark v. Austin*, 340 Mo. 467, 500, 101 S. W. (2d) 977, 996 (1937).

6. "It is a fundamental principle of constitutional law that each department of government, whether federal or state, has, without any express grant, the inherent right to accomplish all *objects naturally within the orbit of that department*, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitation of the Constitution." *In re integration of the Neb. State Bar Ass'n*, 133 Neb. 283, 285, 275 N. W. 265, 266, quoting 1 ANDREWS, *AMERICAN LAW* (2d ed. 1908) § 182, p. 221.

7. Obviously if the court is without power to punish intruders for contempt its power to define and regulate is of little value since it is without sanction. See *Rhode Island Bar Ass'n et al. v. Automobile Service Ass'n et al.*, 55 R. I. 122, 130, 179 Atl. 139, 142, where the court says, "Authority to admit to the bar and disbar necessarily carries with it the power to define what constitutes the practice of law and to exclude unauthorized persons therefrom." Also, *People v. People's Stock Yards Bank*, 344 Ill. 462, 471, 176 N. E. 901, 906 (1931).

8. *People ex rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N. E. (2d) 941 (1937); *State ex rel. Wright v. Hinckle et al.*, 137 Neb. 735, 291 N. W. 68 (1940); *State v. Kirk*, 133 Neb. 625, 276 N. W. 380 (1937); *Shortz et al. v. Farrell*, 327 Pa. 81, 193 Atl. 20 (1937): "Where the application of legal knowledge and technique is required, the activity constitutes such [unauthorized] practice, even if conducted before a so-called administrative board or commission. It is the character of the act and not the place where it is performed which is the decisive factor."

9. In none of the cases found was there set forth any satisfactory logical basis for such a rule. The usual pattern of reasoning employed by the courts is to state first the constitutional ground of the courts' power and then, without mentioning its logical limitations, to make a broad generalization such as that in the text, such generalization apparently being based entirely upon *stare decisis*.

10. A few cases make a distinction on the ground of whether the proceeding in which defendant is participating is directly and immediately reviewable by a court. *Goodman v. Beall*, 130 Ohio St. 427, 200 N. E. 470 (1936). The propriety of such a distinction would seem to depend in part at least on the extent to which the administrative ruling is reviewable. At any rate in the principal case (139 Neb. 91, 96) the court expressly says that it is not putting the decision on this ground.

lature, and its members are not required to be learned in the law. From whence then the alleged *inherent* power of the courts to declare the conduct of a proceeding before such a body a contempt of court?<sup>11</sup> The effect of the principal case and the numerous decisions like it would seem to be the creation of an odd type of common law crime: the appearance before an administrative body, in a representative capacity, of one not a licensed attorney, which crime the legislature would be powerless to abolish since its establishment is held to be within the courts' constitutional power. Query whether the framers of the constitutions ever intended such a result?

**Constitutional Law—Distribution of Powers—Legislative Restriction of Orphans' Court—**Ancillary executor petitioned for order authorizing private sale of decedent's real estate to A at a price of \$25,000, for payment of debts. On the return day, after competitive bidding, the Orphans' Court ordered a private sale to B for \$27,500. Upon A's petition, and before delivery of deed to B, the court revoked its original order and made a new order of sale to A for \$30,000. B filed exceptions, alleging that the court's action was violative of a statute prohibiting the court's setting aside a fiduciary's contract upon receipt of a higher offer.<sup>1</sup> Exceptions dismissed as the court held the legislation an unconstitutional restriction of the jurisdiction of the Orphans' Court. On appeal, *held* (two justices dissenting)<sup>2</sup> reversed. The Pennsylvania constitution does not cloak the Orphans' Court with immunity from legislative restriction. Although the Orphans' Court is a constitutional court, it is one of limited powers conferred by statutes. *Brereton Estate*, 355 Pa. 45, 48 A. (2d) 868 (1946).<sup>3</sup>

Prior to the legislation in controversy, the Orphans' Court had power to set aside a fiduciary's<sup>4</sup> contract of sale any time prior to delivery of

11. In *Clark v. Austin*, 340 Mo. 467, 498, 101 S. W. (2d) 977, 996 (1937) the court says via dictum, "On the contrary, there is a good reason for saying the inherent power of this court does not extend far enough to entitle it to hold independent of the statute that persons practicing before the legislature's delegated agent, the Public Service Commission, must be licensed by us. Undoubtedly this is true on the theory of the strict division of powers adopted in the principal opinion. It would hardly be contended we can make a rule permitting only licensed attorneys to appear in a representative capacity before the legislative committees investigating facts preparatory to the enactment of statutes." Is not this the more cogent line of reasoning?

1. Act of May 24, 1945, P. L. 944, PA. STAT. ANN. (Purdon, 1946 Supp.) tit. 20, §§ 818 and 819. The relevant sections of the act are as follows: "Sec. 1. When a fiduciary shall hereafter make a contract not requiring approval of a court, or when the court shall hereafter approve a contract of a fiduciary requiring approval of court, neither inadequacy of consideration, nor the receipt of an offer to deal on other terms shall, except as otherwise agreed by the parties, relieve the fiduciary of the obligation to perform his contract, or shall constitute grounds for any court to set aside the contract, or to refuse to enforce it by specific performance or otherwise: Provided, That this act shall not affect the inherent right of a court to set aside a contract for fraud, accident or mistake. Sec. 2. Nothing in this act shall affect the liability of a fiduciary for surcharge on the ground of negligence or bad faith in making a contract."

2. Justices Patterson and Jones dissented, holding that the legislation was prohibited by the PA. CONST., Art. V, § 1, which provides that the judicial power of the Commonwealth is vested, *inter alia*, in the Orphans' Courts.

3. The companion case of *Van Voorhis' Estate*, 355 Pa. 82 (1946) upheld the validity of the statute as applied to a contract made by a fiduciary under a testamentary power—one not requiring court approval.

4. Fiduciary is defined as follows in the STATUTORY CONSTRUCTION ACT OF 1937, PA. STAT. ANN. (Purdon, 1941) tit. 46, § 601: "Fiduciary", an executor, adminis-

deed and to order resale at a bid substantially higher.<sup>5</sup> This rule, squarely laid out by the Pennsylvania court in *Orr's Estate*<sup>6</sup> in 1925, was criticized by the dissenting justices in *Kane v. Girard Trust Co.*,<sup>7</sup> who suggested remedial legislation. The Act of 1945 followed, and it was not unexpected that it was challenged as an unconstitutional restriction on the powers of the Orphans' Court. Any legislative encroachment on judicial function will be skeptically viewed in light of the separation of powers doctrine;<sup>8</sup> however, numerous instances are to be found where regulative legislation has been sustained.<sup>9</sup> In some such instances the regulative power has been premised on the distinction between statutory and constitutional courts, with any restriction denied as to the latter.<sup>10</sup> An analogous approach is taken by the court in the instant case as it finds permissive legislative power in the fact that the Orphans' Court, albeit a constitutional court, has always been subject to statutory limitation.<sup>11</sup> Thus, the jurisdiction which the constitution of 1873 vested in the Orphans' Court was a jurisdiction subject to regulation. The dissenting justices place greater stress on the term "constitutional court," with the resultant conclusion that the statute is an unconstitutional curb on an established judicial power.<sup>12</sup> It is to be noted that the Pennsylvania judiciary has not been free from legislative interference;<sup>13</sup> specifically, several acts of

trator, guardian, committee, receiver, trustee, assignee for the benefit of creditors, and any other person, association, partnership, or corporation, acting in any similar capacity."

5. *Kane v. Girard Trust Co.*, 351 Pa. 191, 40 A. (2d) 466 (1945); *Clark v. Provident Trust Co.*, 329 Pa. 421, 198 Atl. 36 (1938); *McCullough's Estate*, 292 Pa. 177, 140 Atl. 865 (1928); *Orr's Estate*, 283 Pa. 476, 129 Atl. 565 (1925). The origin of the rule may be traced to a dictum in *Dundas' Appeal*, 64 Pa. 325, 331 (1870).

6. 283 Pa. 476, 129 Atl. 565 (1925).

7. 351 Pa. 191, 40 A. (2d) 466 (1945). For an excellent discussion of the rule of *Orr's Estate*, see Brigham, *Fiduciary Agreements of Sale* (1944) 15 PA. BAR ASSN. QUARTERLY 221.

8. I COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 173 *et seq.*

9. *Michaelson v. United States*, 266 U. S. 42 (1924); *Ex parte Garner*, 179 Cal. 409, 177 Pac. 162 (1918); *Kronowitz v. Schlansky*, 156 Misc. 717, 282 N. Y. Supp. 564 (1935); *Towson v. Towson*, 126 Va. 640, 102 S. E. 48 (1920) and cases collected in DUFFEE, CASES ON EQUITY (1928) 83, 84, notes.

10. *Shippert v. Shippert*, 371 Ill. 267, 20 N. E. (2d) 597 (1939); *Penn Anthracite Mining Co. v. Anthracite Miners*, 318 Pa. 401, 178 Atl. 291 (1935); *State v. Frew*, 24 W. Va. 416, 459 (1884); *Jelke Co. v. Beck*, 208 Wis. 650, 659, 242 N. W. 576, 580 (1932). *But see* Justice Maxey, concurring, *Penn Anthracite Mining Co. v. Anthracite Miners*, *supra*.

11. Although the Orphans' Court was mentioned in earlier Pennsylvania constitutions, its jurisdiction was set forth in the Act of June 16, 1836, P. L. 784, 792, § 19 (revised and supplemented by the ORPHANS' COURT ACT OF 1917, PA. STAT. ANN. (Purdon, 1930) tit. 20, § 2081), the earlier statute providing that "such jurisdiction shall be exercised under the limitations and in the manner provided by law." The court reasoned that the constitution of 1873 merely conferred on the Orphans' Court its existing jurisdiction, *i. e.*, one limited by statute. This interpretation was urged by the Philadelphia Bar Association, which had helped draft the regulatory legislation of 1945, in an *amicus curiae* brief.

12. The dissent recognizes the right of the legislature to deal with the function and powers of the orphans' courts only to the extent necessary to render them adequate for the exercise of the judicial power committed to them by the Constitution.

13. *Commonwealth ex rel. O'Hara v. Smith*, 4 Binney 116 (Pa. 1811) (altering the original jurisdiction of the supreme court); *Commonwealth v. Green*, 58 Pa. 226 (1868), in which Justice Sharswood, commenting on *Commonwealth v. Smith*, *supra*, stated at page 231, "It will be observed that the power was taken from the Supreme Court without vesting it in any other court." *Commonwealth v. Persch*, 71 Pa. Super. 60 (1919) (creation of the municipal court of Philadelphia). A discussion of legislative enactments which have dealt with jurisdiction and power of the courts is found in *Commonwealth v. Hopkins*, 241 Pa. 213, 88 Atl. 442 (1913).



the legislature have operated to limit the powers of the Orphans' Court,<sup>14</sup> although none to the extent of the present statute. But a decree of unconstitutionality here would have seriously impaired the right of the legislature to impose reasonable restrictions, and would have challenged its undisputed power to change the substantive law.<sup>15</sup> Aside from its constitutional import, the instant decision in upholding the statute gives stability to fiduciary sales, which of necessity were characterized by uncertainty during the tenure of *Orr's Estate*,<sup>16</sup> and clarifies contractual obligations along conventional lines<sup>17</sup>—considerations which conceivably may have influenced the court as it viewed the constitutional question. It is submitted that the court properly sustained the statute, and that it would have no trouble justifying the instant holding in striking down future legislation which would attempt any serious encroachment on the judicial realm.

**Courts—Contempt—Freedom of the Press**—Petitioners, editors and publishers of the "Miami Herald," were adjudged guilty in contempt of a circuit court of Florida, on a citation of petitioners by that circuit court, and judgment was affirmed by the Supreme Court of Florida.<sup>1</sup> Petitioners were responsible for the publication of two editorials and a cartoon charged in the citation as being contemptuous of the circuit court and its judges in that, by imputing to the judges an unfair manipulation of the technicalities and delays of the law for the protection of defendants in criminal prosecutions, they were unlawfully critical of the administration of justice in certain cases then pending before the court.<sup>2</sup> On certiorari to review petitioners' contention that there was no clear and present danger to the administration of justice and that the proceeding against them was violative of their freedom of press, *held*, reversed. There was no clear and present danger to the fair administration of justice in Florida

14. ORPHANS' COURT ACT OF 1917, PA. STAT. ANN. (Purdon, 1930) tit. 20, § 2376 (omits power to issue writs of *venditioni exponas* against real property, a power existing since 1846); FIDUCIARIES ACT OF 1917, PA. STAT. ANN. (Purdon, 1930) tit. 20, § 1024 (deprived the court of power to appoint father or mother of a minor as guardian of the minor's estate). See also the series of statutes on legal investment of trust funds, PA. STAT. ANN. (Purdon, 1930) tit. 20, § 801 (many of which approve investments for trust funds which were not legal as such prior to the effective date of the constitution, and for which the court would have had power to surcharge the fiduciary for any resultant loss to the estate).

15. "The principle (of *Orr's Estate*) had become a rule of property, a part of the substantive law, applied in all courts and not in the orphans' court alone. The Act of 1945 changed the substantive law," instant case at 51.

16. Maxey, C. J., dissenting, in *Kane v. Girard Trust Co.*, 351 Pa. 191, 199, 40 A. (2d) 466 (1945): "A beneficiary is not sacrosanct and a fiduciary ought not to be permitted to repudiate his contract any more than he could do if he were acting as an individual. . . . Curiously enough, the effort to benefit trusts and persons under disability under the above principle has in fact worked to their detriment, as evidenced by the results, because of the uncertainty in fiduciary sales of real estate."

17. The instant decision places fiduciary contracts within the rule laid down in *Welsh v. Ford*, 282 Pa. 96, 127 Atl. 431 (1925), and cases cited therein, that inadequacy of consideration is insufficient to avoid a contract for the sale of real estate.

1. *Pennekamp et al. v. State*, 22 So. (2d) 875 (1945).

2. The Florida court's position was that the state constitution and statutes were conclusive against petitioners and that the only proper federal question was whether petitioners were afforded due process of law. The court felt that there was due process, inasmuch as the constitutional and statutory provisions concerning contempts had always been considered reasonable by the state courts. See *Pennekamp et al. v. State*, 22 So. (2d) 875, 880 *et seq.* (1945).

disclosed by the facts. *Pennekamp et al. v. State of Florida*, 66 Sup. Ct. 1029 (1946).

Although it has been abundantly demonstrated that the early common law conferred no "inherent" power upon the courts summarily to punish contempts committed outside the court, nevertheless, through historical error,<sup>3</sup> this power has in fact been exercised by courts in this country and England since the eighteenth century.<sup>4</sup> Its abuse here, however, led to restrictive legislation;<sup>5</sup> but, while legislative intervention effectively curbed the summary judicial power in some jurisdictions, that power survived in others, including the federal, for many years.<sup>6</sup> It was never contended, until comparatively recently, that the power of a state to punish utterances was connected with the constitutional guaranty of freedom of speech and press.<sup>7</sup> This was true with respect to summary punishments for contempts by publication in state courts even after the adoption of the Fourteenth Amendment.<sup>8</sup> The decision in the instant case operates greatly to restrict the power of the courts so to punish. It is based upon the development of two propositions: first, that the constitutional right to freedom of speech and press, as contained in the First Amendment, is absorbed by the Fourteenth Amendment;<sup>9</sup> and second, that the clear and present danger test is to be applied to any given set of facts involving freedom of

3. The "error" was Blackstone's inclusion in his authoritative work of Wilmot's unwarranted dictum. See 4 BL. COMM. \*284 *et seq.*; FOX, CONTEMPT OF COURT (1927) 226; WILMOT, NOTES AND OPINIONS OF JUDGMENTS (1765) 243; Frankfurter and Landis, *Power to Regulate Contempts* (1927) 37 HARV. L. REV. 1042-1047; Nelles and King, *Contempt by Publication* (1928) 28 COL. L. REV. 408; (1942) 90 U. OF PA. L. REV. 617.

4. The earliest case of punishment for contempt by publication in this country was *Respublica v. Oswald*, 1 Dall. 319 (Pa. 1788); see Mr. Justice Frankfurter, dissenting in *Bridges v. California*, 314 U. S. 252, 279 (1941); STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833) 423 *et seq.*; cases cited, SULLIVAN, CONTEMPTS BY PUBLICATION (1941) 199 *et seq.*; Nelles and King, *supra* note 3, at 422.

5. PA. LAWS 1808-09, c. 78, p. 146; N. Y. REV. STAT. 1829, Part 3, c. 3, tit. 2, Art. 1, § 10. The federal contempt statute limited the summary power to instances involving: (1) misbehavior in the presence of the court, or "so near thereto" as to obstruct the administration of justice; (2) misbehavior of court officers; and (3) disobedience to process. ACT OF MAR. 2, 1831, c. 98, 4 STAT. 487 (1831). Two of the more glaring examples of the abuse of the summary power were concerned with contempts by publication. See *Respublica v. Oswald*, 1 Dall. 319 (Pa. 1788); STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833); Nelles and King, *supra* note 3, at 422.

6. *Craig v. Hecht*, 263 U. S. 255 (1923) (published letter); *Toledo Newspaper Co. v. United States*, 247 U. S. 402 (1918) (newspaper editorials); *The State v. Morrill*, 16 Ark. 384 (1855) (article published in newspaper); *Bradley v. The State*, 111 Ga. 168 (1900) (attempted bribery of juror outside court); *Hitzelberger v. State*, 173 Md. 435, 196 Atl. 288 (1937) (attempt to influence grand juror outside court); *State v. Shepherd*, 177 Mo. 205 (1903) (newspaper editorials); *In re Megill*, 114 N. J. Eq. 604, 169 Atl. 501 (1933) (resolution by municipal board published in newspaper); *State v. Tugwell*, 19 Wash. 238, 52 Pac. 1056 (1898) (newspaper editorials); *State v. Frew and Hart*, 24 W. Va. 416 (1884) (newspaper editorials). Some of those courts that continued to exercise the summary power to punish contempts committed outside their presence were able to find that the restrictive statutes were merely declaratory of the existing common law. *Toledo Newspaper Co. v. United States*, *supra*. *Contra*: *Nye v. United States*, 313 U. S. 33 (1941) (contemptuous acts one hundred miles distant from court). Others reasoned that, being creatures of their respective state constitutions, they were immune to legislative edict. *Bradley v. The State*, *supra*; *State v. Shepherd*, *supra*; *State v. Frew and Hart*, *supra*.

7. Compare *Gitlow v. New York*, 268 U. S. 652 (1925) (prosecution under anti-syndicalism statute), with *Patterson v. Colorado*, 205 U. S. 454 (1907) (contempt by publication).

8. See *Patterson v. Colorado*, 205 U. S. 454, 459 (1907).

9. *Bridges v. California*, 314 U. S. 252 (1941); *Near v. Minnesota*, 283 U. S. 697 (1930); *Gitlow v. New York*, 268 U. S. 652 (1925).

speech, on the one hand, and the obstruction of the administration of justice, on the other.<sup>10</sup> The combination of these propositions was the basis of the decision in the *Bridges* case,<sup>11</sup> where the clear and present danger rule was first applied to contempts by publication. The instant case is significant in that it extends the judicial attitude thus disclosed to a situation in which a definitive state statute is invoked to sustain a prosecution for contempt by publication. The effect of such a statute had been left in doubt by the *Bridges* decision.<sup>12</sup> In the instant case the Court accepted the conclusions of the state supreme court as to the facts of the situation,<sup>13</sup> but declared that the acceptance of such conclusions leaves open to the Court the determination of the constitutional question in the setting of those facts.<sup>14</sup> As a result, it seems fair to say that the United States Supreme Court will consider every case of summary punishment for contempt by publication, where the constitutional right of freedom of speech is raised, upon its merits, in the light of the clear and present danger doctrine, regardless of the reasonableness of state statutes or the conclusions of state courts. It also appears that when the fundamental rights of freedom of speech and the untrammelled administration of justice are in the balance in borderline cases, the former will be accorded the greater protection.<sup>15</sup> The instant case sets no concrete limit beyond which publications will be considered contemptuous. Such a limit has yet to emerge from decisions based on the present federal attitude.

**Eminent Domain—Implied Taking—Rights of the Landowner in Superadjacent Air Space—Defendant, United States Government, leased an airfield near plaintiff's farm.<sup>1</sup> Plaintiff alleged that repeated low flights below legal minimum safe altitude<sup>2</sup> through the air space**

10. The clear and present danger doctrine originated with Mr. Justice Holmes in *Schenck v. United States*, 249 U. S. 47, 52 (1919), where it was enunciated with respect to prosecutions under an espionage statute. The criterion was subsequently applied to other situations in which the constitutional guaranty of freedom of speech was involved. *Cantwell v. State of Connecticut*, 310 U. S. 296 (1940) (breach of the peace at common law); *Herndon v. Lowry*, 310 U. S. 242 (1937) (prosecution under an anti-insurrection statute); *Whitney v. California*, 274 U. S. 357 (1927) (under an anti-syndicalism statute); *Abrams v. United States*, 250 U. S. 616 (1919) (under an espionage act).

11. *Bridges v. California*, 314 U. S. 252 (1941), (1942) 90 U. OF PA. L. REV. 617.

12. See *Bridges v. California*, 314 U. S. 252, at 260 and 263 (1941).

13. The Court conceded that the truth was maliciously distorted and withheld by petitioners out of a desire to destroy the efficiency of the courts and that the judgment below was not erroneous under Florida law. Instant case, at 1036.

14. Instant case, at 1036.

15. See instant case, at 1037; *Bridges v. California*, 314 U. S. 252, 263 (1941).

1. The end of the northwest-southeast runway was a little over 2200 feet from plaintiff's house and buildings.

2. The statutory basis for these regulations is the Air Commerce Act of 1926, 44 STAT. 568 (1926), 49 U. S. C. § 171 *et seq.* (1940), as amended by the Civil Aeronautics Act of 1938, 52 STAT. 973 (1938), 49 U. S. C. § 401 *et seq.* (1940). These statutes grant to any citizen of the United States a public right of "freedom of transit in air commerce through the navigable air space of the United States." 49 U. S. C. § 403 (1940). "Navigable air space" is defined as the "air space above the minimum safe altitude of flight prescribed by the Civil Aeronautics Authority." 49 U. S. C. § 180 (1940). In the case of the planes complained of (in the instant case) the minimum safe altitude of flight prescribed was five hundred feet during the day and one thousand feet at night. Civil Air Regulations, 3 Code Fed. Reg. Supp., tit. 14, §§ 61.7400 and 61.7401 (1944). The majority held that the provision of the Civil Aeronautics

above his land by military aircraft from the airfield, with attendant noise, glare and danger to the occupants of the farm constituted a "taking" within the Fifth Amendment.<sup>3</sup> *Held* (two justices dissenting): 1. Court of Claims affirmed in finding that acts alleged<sup>4</sup> constituted a "taking." 2. Court of Claims reversed in finding a permanent easement taken by the United States and case remanded to find sufficient facts to determine the nature of the easement.<sup>5</sup> *United States v. Causby*, 66 Sup. Ct. 1062 (1946).

This is a case of first impression on the question of whether flights of government aircraft over land may constitute a "taking" of property within the Fifth Amendment. Although it is well settled that the Federal Government may, as an attribute of sovereignty,<sup>6</sup> appropriate property for the public use, the law is considerably less settled on the question of what acts in the absence of formal condemnation proceedings amount to a "taking."<sup>7</sup> Where there are no such proceedings, the property-owner may

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Authority for an angle of glide of thirty-to-one in landing and taking off was not an exception to the minimum safe altitude rules and since it is shown that the angle of glide over plaintiff's property was eighty-three feet from the ground, the fact that these planes were within the legal angle of glide did not save them from violation of the minimum safe altitude rules.

3. U. S. CONST. AMEND. V: ". . . nor shall private property be taken for public use without just compensation." All states except North Carolina have similar provisions in their constitutions. 1 LEWIS, EMINENT DOMAIN (3d ed. 1909) § 61.

4. Facts found by the Court of Claims in *Causby v. United States*, 60 F. Supp. 751 (Ct. Cl., 1945) were that the noise of engines, the glare of lights and that apprehension created by low-flying aircraft frequently deprived the family of sleep and made them nervous. Also, that plaintiff was forced to give up his chicken business because of a loss of egg production traceable to the named disturbances and because many chickens were killed by flying into the walls of the chickenhouses in fright.

5. The Court of Claims found that a permanent easement had been taken and that the plaintiff was entitled to damage of \$2000 which represented the value of the easement and of the property destroyed. The Supreme Court here remanded the cause because the Court of Claims had not determined the nature of the easement in terms of frequency of flight, permissible altitude or type of plane nor had given a sufficient basis for its finding that the easement was permanent. It is necessary, the Court said, that an accurate description of the property taken be made because that interest vests in the United States.

6. The right of the Sovereign to appropriate property to the public use is well established in our law. *United States v. Jones*, 109 U. S. 513 (1883). The obligation of the Government to pay for the property thus taken is recognized as an integral part of the concept. This latter duty is placed on the states by the Fourteenth Amendment and on the Federal Government by the Fifth Amendment. For a general discussion of eminent domain, see LEWIS, EMINENT DOMAIN (3d ed. 1909) §§ 1 to 10. Also Cormack, *Legal Concepts in Cases of Eminent Domain* (1931) 41 YALE L. J. 221.

7. It was formerly held that a direct physical invasion of land was necessary to constitute a "taking." *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1843) and when it was found that a "taking" had occurred the United States was held liable on the theory of an implied promise to pay for property so taken. *United States v. Lynah*, 188 U. S. 445 (1903); *United States v. Great Falls Manufacturing Co.*, 112 U. S. 645 (1884). But with the developing realization in the law that "property" consisted, not in tangible things, but rather in the aggregate of legal rights in relation to those things this narrow construction of "taking" had to give way to the broader interpretation that an interference with the use and enjoyment of land might be a "taking" whether a physical invasion was involved or not. This idea was first expressly set forth in *Eaton v. B. C. & M. R. R.*, 51 N. H. 504 (1872) and represents the view of the courts today. See 1 LEWIS, EMINENT DOMAIN (3d ed. 1909) § 65. While this more liberal view works greater justice in most cases to the aggrieved landowner it is much more difficult of definition than a "physical invasion" and for this reason the law is very unsettled on the subject, *e. g.*, *United States v. Cress*, 243 U. S. 316 (1917) held that flooding of plaintiff's land was a taking but *Bedford v. United States*, 192 U. S. 217 (1904) held that erosion of plaintiff's land as the result of the United States' constructing of a dam several miles upstream is only a consequential injury not recoverable against the United States.

seek compensation in the Court of Claims under the Tucker Act<sup>8</sup> by showing an express or implied contract by the Government to pay for the property taken. The indefinite test set forth in *United States v. Cress*<sup>9</sup> that "It is the character of the invasion, not the damages resulting from it so long as the damages are substantial, that determines the question of whether or not there has been a taking" is here used by the Court. Under this rule, therefore, it was necessary first to determine whether or not plaintiff's property was here involved before the directness of the invasion could be decided and in deciding that it was, the Supreme Court for the first time put itself on record on the matter of ownership of superadjacent air space.<sup>10</sup> This problem is one of importance in this day of air traffic and of divergent opinion among the courts and authorities.<sup>11</sup> Here, the Court while rejecting the ancient maxim<sup>12</sup> which proclaimed the ownership by the landowner in airspace above his land to extend to the heavens, as inapplicable in the modern world, cautiously refuses to establish definite limits of ownership in the air column, probably in view of the relative

8. 24 STAT. 505 (1887), 28 U. S. C. § 250 (1) (1940): "All claims . . . founded on the Constitution of the United States . . . upon any contract express or implied with the government of the United States. . . ."

9. 243 U. S. 316, 328 (1917).

10. Some hint of the Court's view may, however, be noted in *Northwest Airlines v. Minnesota*, 322 U. S. 292, 303 (1944) (concurring opinion), where Justice Jackson said: "Today the landowner no more possesses a vertical control of all the air above him than the shore owner possesses horizontal control of all the sea before him."

11. There are four general theories of air space rights of the landowner and each finds both support and criticism among the authorities and the courts. One theory holds that the landowner owns the air space above his land to an unlimited height subject only to an "easement" of flight by the public. This theory is adopted by the UNIFORM STATE LAW FOR AERONAUTICS [9 UNIFORM LAWS ANN. 17 (1923)] which is in force in twenty-three states and is also adopted by the RESTATEMENT OF TORTS (1934) § 194. Strong criticism of this theory is voiced in Wherry and Condon, *Aerial Trespass Under the Restatement of Torts* (1935) 6 AIR L. REV. 113. A second theory is that enunciated in *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385 (1930) and affirmed in *Burnham v. Beverley Airways, Inc.*, 311 Mass. 628, 42 N. E. (2d) 575 (1942), which holds that the landowner owns the air space to such height as is fixed by statute in the form of minimum altitude regulations. For a defense of this theory see Bohlen, *Surface Owners and the Right of Flight* (1932) 18 A. B. A. J. 533. But this view was flatly rejected by the circuit court in *Swetland v. Curtis Airport, Corp.*, 41 F. (2d) 929 (N. D. Ohio 1930), modified 55 F. (2d) 201 (U. S. C. C. A. 6th, 1931), where it was said that the statutory limitations on altitudes of flight were meant to impose criminal liability only for their violation, not to be the basis of civil liability. The court, instead, enunciated a third theory of air space rights—the "zone of effective possession" theory which holds that the landowner owns air space up as far as it is possible for him to take possession of it but no farther. The Court of Claims and the Supreme Court in the instant case appear to endorse this view. This view was upheld in *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S. E. 817 (1934) and affirmed in *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S. E. (2d) 245 (1942). A fourth view is expressed in *Hinman v. Pacific Air Transport Co.*, 88 F. (2d) 755 (C. C. A. 9th, 1936), cert. denied 300 U. S. 654. This theory is that the landowner owns only such space as he actually uses and that he can recover for uses of the air space only if he can show damage to his surface interests. This theory is supported in REYNE, AIRPORTS AND THE COURTS (1944) 163.

12. Usually expressed in the Latin: *Cujus est solum ejus est usque ad coelum*. The first reference to this maxim in the English law was by Coke (1 COKE, INSTITUTES, 19th ed. 1832, Ch. 1, § 1(4a)). It is said to have originated, however, with one Accursius, a commentator on the Roman Law, who was brought to England by Edward I shortly after 1200. His reference was, however, restricted to free air space above burial plots, a provision of the Roman Law (Dig. xliii, 24 fr. 22, § 4). The maxim was first applied in *Bury v. Pope*, 1 Elizabeth 118, 78 Eng. Rep. 375 (1586) and in many subsequent English and American cases. For a good discussion of the development of this maxim in our law, see GOUDY, *Two Ancient Brocards*, in ESSAYS IN LEGAL HISTORY (1913), or Sweeney, *Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law* (1932) 3 J. OF AIR L. 329, 355-373.

newness of the problem and the uncertainties of air commerce in the future. However, the majority does hold that the landowner owns *some* superadjacent air space, as is evidenced by the conclusion that "The landowner owns at least as much of the space above the ground as he can use or occupy in connection with the land."<sup>13</sup> The Court thus adopts the middle ground between several opposing theories which have been developed by the courts in prior aviation cases. One theory is that the amount of superadjacent air space belonging to the surface-owner is limited only by legislation in the form of minimum safe altitude regulations.<sup>14</sup> At the other extreme, it was urged in a recent case<sup>15</sup> that a landowner owns only so much of the air space as he actually uses. The decision appears, therefore, to take out of the legislative realm the problem of fixing property rights in the air and to preserve this prerogative to the courts. This intermediate view would seem best adapted to the reconciliation of the agreed right of the landowner to use the air space above his land in whatever manner and to whatever height he chooses<sup>16</sup> with the equally well-agreed requirement that the air as a channel of commerce remain free for use by all.<sup>17</sup> Some amount of confusion appears in the Court's analysis of what, in this case, was taken. It has been held that where the Government, in appropriating property, does not totally destroy the use and enjoyment—i. e., takes only partially the property—that in such case the fee may remain in the owner subject, however, to the right of easement by the Government<sup>18</sup> and the Court here affirms the Court of Claims' finding that an easement has been taken. But it does not expressly state whether it is an easement on the land, by reason of extensive damage to surface rights, or whether it is an easement in the air.<sup>19</sup> In spite of the reliance on *Portsmouth Harbor*

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13. Instant case at 1067.

14. Note 11 *supra*. In rejecting this theory the Court saved itself from denying the property-fixing effect of the CAA regulations regarding minimum safe altitudes of flight, by finding a violation of these regulations in the instant case (see note 2 *supra*). The dissent, through Justice Black, took sharp issue with this interpretation of the regulations, asserting that reason and a study of the legislative history of the Civil Aeronautics Act of 1938, as revealed in H. R. REP. NO. 1162, 69th Cong., 1st Sess. (1926) 12, would show that it was the intent of Congress to draw a distinction between the minimum safe altitude regulation and the angle of glide regulation, and that therefore the majority could not reasonably call the flights in the instant case an invasion of private property without declaring the Act unconstitutional.

15. *Hinman v. Pacific Transport Co.*, 88 F. (2d) 755 (C. C. A. 9th, 1936), *cert. denied* 300 U. S. 654.

16. Under none of the theories set forth is the landowner's right to use his land as he sees fit denied. Even if he uses it in such a way that it seriously hampers operations of an adjacent airport his right to do so has been sustained. *Guith v. Consumer's Power Co.*, 36 F. Supp. 21 (E. D. Mich. 1940); *Capitol Airways, Inc. v. Indianapolis Power and Light Co.*, 215 Ind. 462, 18 N. E. (2d) 776 (1939). However, if spite or malice are shown to be the cause of the obstruction, the court will order him to remove it. *United Airport Co. v. Hinman*, 1940 U. S. Av. Rep. 1, 235 C. C. H. § 1829 (S. D. Cal. 1939).

17. Civil Aeronautics Act of 1938, 52 STAT. 973, 980 (1938), 49 U. S. C. § 403 (1940): "There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States." It is obvious that if absolute ownership were recognized in air space to an indefinite height that air commerce would be impossible by reason of the multiplicity of trespass actions.

18. *United States v. Cress*, 243 U. S. 316 (1917).

19. Whether or not an easement may be gained in the air by prescription is a subject on which the courts have not agreed. The court in *Swetland v. Curtiss Airport Corp.*, 41 F. (2d) 929 (N. D. Ohio 1930), *modified* 55 F. (2d) 201 (C. C. A. 6th,

*Land & Hotel Co. v. United States*<sup>20</sup> where a "taking" of property was found because of damage to surface interests even though the Government never actually invaded the plaintiff's land, and in spite of the Court's statement: "We agree . . . that a servitude has been imposed on the land,"<sup>21</sup> it seems that the Court by its strong assertion of title in the landowner to *some* air space really meant an easement in the air. The Court's attention to damage to surface interests would seem, therefore, to have been for the purpose of showing "substantial" damage to property under its test of "taking." While it is rather hard to spell out an easement of any kind<sup>22</sup> in this case, it is to be recognized that the traditional concept of easement is concerned only with land. Although the Court relies strongly on the *Portsmouth* case to substantiate its finding of a "taking," it is clear that the instant decision is a significant extension of "taking" in eminent domain for, as before pointed out, the *Portsmouth* decision turned on damage to surface interests while this decision is based on a direct interference with the full enjoyment of title of which right to *some* air space is a part. This broad concept of property,<sup>23</sup> while strongly realistic, is the subject of concern and criticism by the dissenting opinion<sup>24</sup> and its use in determining a "taking" may well be an embarrassing restriction on increasing governmental venture into public works in the future.

**Evidence—Res Gestae—Admissibility of Confessions as a Part of the Res Gestae**—During a successful search of defendant's premises to ascertain his possession of untaxed liquor, defendant made certain statements admitting to the searching officers that anything that might be found belonged to him. On trial for illegal possession of untaxed whiskey the above statements were received in evidence against defendant. Convicted, defendant appealed on ground that the statements admitted were in the nature of confessions, and that the state had failed to show that they were voluntarily made. *Held*, judgment affirmed; the statements

1931), appeared to indicate that such an easement might be gained. But in *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385 (1930) the court expressly rejected the idea because of the fact that flights cannot be in sufficiently the same space as to satisfy the requirements of the securing of an easement of this nature. This same objection to the idea was voiced in *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S. E. 817 (1934), and in *Hinman v. Pacific Air Transport Co.*, 88 F. (2d) 755 (C. C. A. 9th, 1936), *cert. denied* 300 U. S. 654.

20. 260 U. S. 327 (1922). In that case, the court found that the Government had imposed a "servitude upon the land" by placing artillery batteries in such way that it showed an "abiding purpose" to use plaintiff's land whenever it willed.

21. Instant case at 1068.

22. The usual requirements for gaining easements on land by prescription is an open, adverse use of another's land for the prescriptive period. TIFFANY, *REAL PROPERTY* (3d ed. 1939) §§ 756-828; THOMPSON, *REAL PROPERTY* (1924) §§ 280-640. There is no allegation here that the prescriptive period has run, for example, nor is it shown that the flights were within a sufficiently identical path as would usually satisfy the requirements for gaining an easement on land.

23. This use of the term is generally accepted today as expressing the more realistic concept of property. *RESTATEMENT OF PROPERTY* (1936) §§ 1 to 4; HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED TO JUDICIAL REASONING* (1923) 162; Cormack, *Legal Concepts in Cases of Eminent Domain* (1931) 41 *YALE L. J.* 221.

24. The dissent points out (at 1070) that since the majority find a taking by virtue of noise, glare, etc., and seemingly not because of the invasion of the air column *per se* that it has in reality spelled out only a tort, at best, which is not permitted as a basis of claim against the United States.

were admissible as part of the *res gestae*.<sup>1</sup> *Tillison v. State*, 27 So. (2d) 43 (Ala., 1946).

The established rule in Alabama, as in most other jurisdictions, requires that the prosecution show the voluntary character of confessions before such utterances will be admissible in evidence.<sup>2</sup> The court's decision, in the instant case, is based upon the following premise: "A *res gestae* statement is admissible, notwithstanding the fact that it may not be admissible as a confession or an admission."<sup>3</sup> This constitutes an unwarranted extension of the *res gestae* doctrine.<sup>4</sup> It is submitted that the underlying reason for the modern survival of the rule restricting the admission of confessions to those shown to be voluntarily made is to remove the incentive for mistreatment of prisoners.<sup>5</sup> On the other hand,

1. Although the court shows itself to be conversant with the well-established rules applicable to the admissibility of confessions and admissions, it confines its discussion of these rules to dictum. Reasoning that the statements were a part of the *res gestae*, and therefore admissible without further consideration, the court evidently deemed it unnecessary to apply the normal restrictions.

2. All jurisdictions require that confessions be voluntarily made in order to be admissible. There is some difference of opinion regarding the burden of proof. Alabama, with the vast majority of United States jurisdictions, requires that the prosecution must show that the confession was made voluntarily, *i. e.*, without any improper inducement. A few jurisdictions regard the confession as *prima facie* admissible, and require the defendant to show that the alleged improper inducement existed. For a complete survey see 3 WIGMORE, EVIDENCE (3d ed. 1940) §860. As pointed out in the instant case, at 45, Alabama also has a line of cases permitting the admission of confessions as *prima facie* voluntary if circumstances affirmatively show no improper influence.

3. Instant case at 45. Cited as authority for this proposition were: *Williams v. State*, 147 Ala. 10, 41 So. 992 (1906) (declarations of murderer, made while standing over deceased with smoking gun in hand, held admissible as a part of the *res gestae*; preliminary proof that they were voluntarily made deemed unnecessary); *Head v. State*, 44 Miss. 731 (1870) (declarations made by defendant at the time of shooting, as to the effect of his shot, are not "confessions in the technical sense," but connect themselves with the act and form part of the *res gestae*); *Bronson v. State*, 51 Tex. Cr. R. 17, 127 S. W. 175 (1910) (burglar, shot down while escaping from chicken coop, made declarations to captor admitting guilt: held admissible as *res gestae*, although otherwise inadmissible as a confession made in custody without warning). These cases may be distinguished only by the spontaneity of the declarations, as opposed to the more questionable circumstances in the instant case. But, more than that, these decisions also constitute uneivable extensions of the *res gestae* doctrine, all the more deplorable because they have been cited as precedent.

4. The phrase *res gestae* has been extended within the field of evidence to cover a wide variety of situations. The indiscriminate use of the phrase in judicial reasoning has led to a similar confusion of thought in texts and digests, and this in turn to a more widespread uncertainty in the cases. The only solution to the confusion, caused by the nebulous concept of *res gestae*, is to recognize the true rule involved in each case, and to avoid the use of the term so far as possible. Among the numerous "bon mots" adversely criticizing the use of the phrase the following two excerpts stand out: in *United States v. Matot*, 146 F. (2d) 197, 198 (C. C. A. 2d, 1944) Judge Learned Hand has recently said: "... as for 'res gestae', it is a phrase which has been accountable for so much confusion that it had best be denied any place whatever in legal terminology; if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms."; C. J. Bleckley in *Cox v. State*, 64 Ga. 374, 410 (1879) said, "The difficulty of formulating a description of the *res gestae* which will serve for all cases, seems unsurmountable. To make the attempt is something like trying to execute a portrait which shall enable the possessor to recognize every member of a very numerous family."

5. Limitations upon the admission of extrajudicial confessions in evidence were originally applied upon the principle that untrustworthy admissions of guilt should be excluded. Progressively stricter limitations were later applied, developing a body of precedents with a definite inclination to reject confessions on the slightest pretext. Dean Wigmore attributes this development to what he terms a "sentimental irrationality," for which he suggests several possible explanations. These suggested explanations include: 1. the character of persons usually brought to bar on charges of crime;



the "spontaneous exclamations" exception to the hearsay rule has long been established in its own right, mainly because such testimony has been found by experience to be trustworthy;<sup>6</sup> courts and lawyers constantly using the phrase *res gestae* to describe its application.<sup>7</sup> In the instant case the court makes the fact that the statements were made "... while the mind was still acting under the exciting cause of the occurrence" a prerequisite to their admissibility as *res gestae*.<sup>8</sup> The court also emphasizes the fact that the statements were made during the search, which constituted "... but one continuous transaction."<sup>9</sup> But could the court justifiably say that these statements were spontaneous in the sense that they were uttered under the stress of nervous excitement produced by physical shock?<sup>10</sup> If not spontaneous, then, of what significance is the fact that they were a part of the transaction? And even if conceded to be spontaneous and a part of the transaction, should they be admitted

2. the absence at the time of the right to appeal in criminal cases; 3. the extraordinary handicaps placed upon the accused at Common Law as a result of his inability either to testify for himself or to have counsel defend him, 3 WIGMORE, EVIDENCE (3d ed. 1940) § 865. These reasons may very well explain the persistence and development of restrictions on admissibility of confessions in the past, but their universal application today is probably due to a well-founded fear of police strong-arm methods. For a good rationale of present-day English practice see *Confessions in Criminal Cases* (1939) 9 FORT. L. J. 6.

6. It is only since the publication of Dean Wigmore's Treatise that this exception to the hearsay rule has gained wide recognition, but today it is generally accepted. Although the principle itself is a broad one, and its phrasings differ widely in different courts, there is in the judicial opinion of today an approach to uniformity of application. Trustworthiness of testimony is universally accepted as the reason for its usefulness. 6 WIGMORE, EVIDENCE (3d ed. 1940) § 1747.

7. Use of the phrases *res gestae* and "spontaneous exclamations" is becoming increasingly interchangeable. Most modern courts using the term *res gestae*, as applied to utterances, make spontaneity a prerequisite, while most courts discussing the "spontaneous exclamations" exception to the hearsay rule cannot resist introducing *res gestae* to round out their opinion. The following recent cases illustrate this practice: *Brown v. United States*, 40 A. (2d) 832 (D. C. 1945); *Commonwealth v. Harris*, 351 Pa. 325, 41 A. (2d) 688 (1945); *Frazee v. State*, 153 P. (2d) 637 (Okla. Cr. 1944); *Moree v. State*, 147 Tex. Cr. R. 564, 183 S. W. (2d) 166 (1944); *Jackson v. State*, 77 Okla. Cr. 160, 140 P. (2d) 606 (1943). For a good analysis of *res gestae* v. "spontaneous exclamations," see Note (1946) 32 CORN. L. Q. 115.

8. Instant case at 45.

9. Instant case at 44.

The requirement that the utterance, to be admitted as *res gestae*, be "a part of the transaction" is one of the chief roots of evil from which spurious enlargements of the doctrine grew. Originating in the "verbal acts" doctrine, and soon becoming inherent in *res gestae*, this supposed limitation has had a marked effect on the "spontaneous exclamations" exception to the hearsay rule. Its effect, in many cases, has been to make the decision turn merely upon the question of whether the declaration can be regarded as "a part of the transaction," no attempt being made to discover a circumstantial guarantee of sincerity. Dean Wigmore hopefully points out that probably in recent times the number of such cases is few. See 6 WIGMORE, EVIDENCE (3d ed. 1940) § 1757.

10. Traditionally, statements to be admitted as "spontaneous exclamations" must have been made when the reflective faculties have been stilled by nervous excitement from a physical stimulus, and the utterances are sincere responses to actual sensations and perceptions. The essentials of this theory were first recognized in the early case of *Thompson v. Trevanion* [1693, N. P.] Skin. 402. For a clear statement of the modern requirements for admissibility, as coming under this exception to the hearsay rule, see *Keefe v. State*, 50 Ariz. 293, 297, 72 P. (2d) 425, 427 (1937). It is difficult to discover decisions which do not involve at least a threatened physical shock. Query as to the applicability of this exception to the hearsay rule to statements made under "mental shock" alone. Query whether even "mental shock" can be found in the instant case.

without the normal safeguards accorded to confessions?<sup>11</sup> In effect this decision completely subordinates society's interest in freedom from the use of undue influence in obtaining confessions to the court's interest in obtaining trustworthy testimony. The danger inherent in such practice is clear, since it will include within its scope all statements which the court, in its broad discretion, might term "a part of the transaction."<sup>12</sup>

**Insurance—Subrogation of Surety—Loan Receipt—Plaintiff Insurance Co.** sued to recover the value of drafts forged by its employee and honored without knowledge of the forgery by defendant bank. This insurance company was insured by fidelity bond with another insurance firm against such loss. Insurer indemnified the plaintiff, taking in return a loan receipt describing the payment as a loan to be repaid only out of funds recovered by the plaintiff from those responsible for the loss. The plaintiff agreed therein to promptly prosecute such claims at the expense and under the control and direction of the insurer, *Held*, that the transaction resulted in a payment, not a loan, and therefore, having been compensated for the loss, plaintiff was not entitled to recover. *American Alliance Insurance Co. v. Capital National Bank of Sacramento*, 171 P. (2d) 449 (Cal., 1946).

This decision follows the principle of *Meyers v. Bank of America*,<sup>1</sup> and prevents the insurance company from circumventing that decision by the use of the loan receipt.<sup>2</sup> In that case it was held that the insurer, having been paid to accept the risk of loss,<sup>3</sup> could not recover by subrogation against a bank which had innocently cashed forged checks and whose

11. Misapplication of the "verbal act" doctrine has contributed to the confusion surrounding admissibility of evidence as a part of the *res gestae*. This doctrine does not constitute an exception to the hearsay rule but rather applies to utterances accompanying conduct to which it is desired to attach some legal effect, and as such is admissible merely as a verbal part of the act. 6 WIGMORE, EVIDENCE (3d ed. 1940) § 1772. To some extent the laxness of the restrictions imposed upon the admission of *res gestae* statements may be traced to this doctrine.

12. The court cites *Ballas v. State*, 27 Ala. App. 276, 171 So. 383 (1936) and *Riley v. State*, 27 Ala. App. 376, 172 So. 680 (1937), to show that, under similar circumstances, the Court of Appeals of Alabama has admitted such statements as a part of the *res gestae*. But this does not change the fact that the police, in their diligence, are enabled, by these decisions, to obtain incriminating statements by the use of undue influence and feel confident of their admission in evidence, so long as the circumstances under which they were obtained may be termed "a part of the transaction."

1. 11 Cal. (2d) 92, 77 P. (2d) 1084 (1938), 27 CALIF. L. REV. 88, (1939) 12 So. CALIF. L. REV. 490.

2. Appellant's opening brief on page 10 states: "We are fully aware of the principles in *Meyers v. Bank of America* . . . to the effect that payment by way of satisfaction of plaintiff's loss by the bonding company extinguished plaintiff's cause of action.

"Our answer is that the parties to the loan agreement also were aware of these decisions and principles. The bonding company consciously and deliberately avoided 'payment'. Both the 'bonding' company who advanced the money and the 'bonded' company (plaintiff) who received it, stipulated that it was a 'loan' for the express purpose of preserving alive in plaintiff its right of action against third persons who under established principles of law were liable to it for loss."

3. "Here the indemnitor has discharged its primary contract liability. It has paid what it contracted to pay, and has retained to its own use the premiums and benefits of such contract. . . . We cannot say that as between the bank and the paid indemnitor, the bank should stand the loss." *Meyers v. Bank of America*, 11 Cal. (2d) 92, 77 P. (2d) 1084, 1089 (1938). *Accord*, *Atlantic Trust and Deposit Co. v. Town of Laurinburg*, 163 F. 690, 695 (C. C. A. 4th, 1908) (stating that it is the surety's business to take risks and expect losses).

equities were equal or superior to those of the insurer;<sup>4</sup> and that an assignment of the chose in action against the bank by the insured to the insurer would add nothing to the rights of the insurer acquired by subrogation.<sup>5</sup> This rule does not deny recovery against a principal tortfeasor,<sup>6</sup> but applies only to actions against third parties who have not participated in the wrong,<sup>7</sup> yet against whom the insured has a cause of action. The result is that while the plaintiff could have recovered from the bank prior to the indemnity payment,<sup>8</sup> the insurer, who should by subrogation acquire all of the rights of the plaintiff, is not permitted to exercise that right against the bank. Nor would plaintiff be permitted to recover since it is no longer the real party in interest and would not be permitted to recover twice for the loss.<sup>9</sup> The equities of the parties are permitted to overcome logical application of the principle of subrogation. The insurer therefore bears the full loss, and the bank escapes completely. This in turn only transfers the burden, in the course of sound insurance practice, back to the insured as the premium payer.<sup>10</sup> If, on the other hand, recovery against the bank would be granted in these cases, the paid surety would be relieved of a risk it had contracted to assume, and at the expense of a bank which may well have acted with all due care and diligence in the course of essential business transactions. It has been suggested that the

4. "Our conclusion . . . is that since the bonding company has no superior equities, it was not entitled to be subrogated to any claim plaintiff might have had against the bank." *Meyers v. Bank of America*, 11 Cal. (2d) 92, 77 P. (2d) 1084, 1089-1090 (1938). "When it is sought to enforce the right [of subrogation], something more must be shown than that the defendant could have been compelled by the original creditor to pay the debt. While a surety may arrest the right against one with whom he had no contractual relations, it must appear that the defendant participated, with notice, in the illegal act of the principal which served to bring about the loss. The right to recover from a third person does not stand on the same footing as the right to recover from the principal. As to the latter, the right is absolute.—As to the former, it is conditional." *Northern Trust Company v. Consolidated Elevator Co.*, 142 Minn. 132, 171 N. W. 265, 268 (1919). *Accord*, *American Surety Co. v. Bank of California*, 133 F. (2d) 160 (C. C. A. 9th, 1943); *Washington Mechanics Savings Bank v. District Title Insurance Co.*, 62 App. D. C. 194, 65 F. (2d) 827 (C. C. A. D. C., 1933). *Loyd, The Surety* (1917) 66 U. OF PA. L. REV. 40, 65-67. "A growing number of decisions deny both partial and complete subrogation to the contractual surety as against the quasi-surety who has acted in good faith and without negligence, where to allow subrogation would cause affirmative loss, and not mere deprivation of gain." Langmaid, *Some Recent Subrogation Problems in the Law of Suretyship and Insurance* (1934) 47 HARV. L. REV. 976.

5. "Where by the application of equitable principles, a surety has been found not to be entitled to subrogation, an assignment will not confer upon him the right to be so substituted in an action at law upon the assignment." *Meyers v. Bank of America*, 11 Cal. (2d) 92, 97, 77 P. (2d) 1084, 1086 (1938). *Accord*, *Louisville Trust Co. v. Royal Indemnity Co.*, 230 Ky. 482, 20 S. W. (2d) 71 (1929). *Contra*: *Grubnau v. Centennial National Bank*, 279 Pa. 501, 124 Atl. 142 (1924).

6. *Anheuser-Busch, Inc. v. Starley*, 170 P. (2d) 448 (Cal., 1946); *Indemnity Ins. Co. of N. America v. Sampson*, 104 P. (2d) 374 (Cal., 1940).

7. Subrogation "is properly applied in favor of a surety on a fidelity bond only against persons who have participated in the wrong of its principal. . . . It is never applied against an innocent person wronged by the principal's fraud." *American Surety Co. of N. Y. v. Lewis State Bank*, 58 F. (2d) 559, 560 (C. C. A. 5th, 1932).

8. *Farmers State Bank in Merkle v. U. S.*, 62 F. (2d) 178 (C. C. A. 5th, 1932); *LaFayette and Bros. v. Merchants Bank of Ft. Smith*, 73 Ark. 561, 84 S. W. 700 (1905); *Standard Steam Specialty Co. v. Corn Exchange Bank*, 220 N. Y. 478, 116 N. E. 386 (1917); *Clearfield Nat. Bank v. Madera Nat. Bank*, 87 Pa. Super. 564 (1926).

9. *American Alliance Insurance Co. v. Capital Nat. Bank*, 171 P. (2d) 449, 451 (Cal., 1946).

10. *Loyd, The Surety* (1917) 66 U. OF PA. L. REV. 40, 67.

bank is itself in the position of a surety in these cases,<sup>11</sup> and it becomes a question then of which of two sureties shall bear the loss. This view of the problem is particularly cogent when it is considered that the bank is probably also insured against this type of loss. A reasonable solution could be reached by requiring contribution by both the surety and the bank.<sup>12</sup> The courts have not adopted this solution to the problem, however, and the insurer has had to look for relief to other means. The loan receipt, having proved effective to avoid the effects of subrogation in certain other types of insurance cases,<sup>13</sup> was tried here as an answer to the problem.<sup>14</sup> But the loan receipt has not been universally accepted by the courts, and there is authority for limiting the use of this device to the type of insurance situation wherein it fills the requirements of a special need.<sup>15</sup>

11. "One who is actually liable . . . but whose liability rests either upon rules of law independent of contract or upon a contract whose purpose is not suretyship" is treated as an "involuntary surety, a surety by operation of law, a constructive surety, or a quasi-surety." Langmaid, *Some Recent Subrogation Problems in the Law of Suretyship and Insurance* (1934) 47 HARV. L. REV. 976, 977.

12. *Id.* at 978. Also (1938) 27 CALIF. L. REV. 88.

13. The loan receipt was first developed in marine insurance, not merely to avoid the effects of subrogation, but to meet a very real need due to the peculiar situation presented. There the insured shipper of goods could recover for loss only if the carrier could not make compensation, and the carrier by the terms of the agreement was to have the benefit of the shipper's insurance. If the insurance company paid the shipper, it lost the right of action against the carrier. If it did not pay until after the liability of the carrier had been determined, the shipper was denied the immediate compensation for which it had contracted and which would be necessary to the conduct of its business. The loan receipt permitted the shipper to be compensated immediately without relieving the carrier of liability. Justice Brandeis in his opinion delivered in *Luckenbach v. McCahan Sugar Refining Co.*, 248 U. S. 139, 149 (1918), said of the loan receipt: "It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice." The validity of loan receipts appears to be generally upheld in carrier and warehouse cases. But insurance companies began to extend the use of the loan receipt to accident cases in an attempt to avoid appearing as a party, and thus to avoid the effects of the prejudice of the ordinary jury against insurance companies where damages are to be determined. In New York, where most of the cases have come up, the cases are in conflict on this. *Loan Receipt Transactions Between Insurer and Insured* (Sept. and Oct. 1945) INS. L. J. 528-532, 592-599. The following cases have upheld the loan receipt: *Dixey v. Federal Compress and Warehouse Co.*, 132 F. (2d) 275 (C. C. A. 8th, 1942) (insurance on cotton in warehouse); *First Nat. Bank of Ottawa v. Lloyds of London*, 116 F. (2d) 221 (C. C. A. 7th, 1940) (insurance on shipments of currency); *Automatic Sprinkler Corp. of America v. Robinson-Slagle Lumber Co.*, 147 So. 542 (La., 1933) (fire insurance); *Sullivan v. Naiman*, 32 A. (2d) 589 (N. J., 1943) (fire insurance); *Sosnow, Krantz & Simcoe, Inc. v. Storetti Corp.*, 269 App. Div. 122, 54 N. Y. S. (2d) 780 (1945), *affirmed* 295 N. Y. 675 (1946) (fire insurance); *Thompson Heater Corp. v. Hardware Indemnity Ins. Co.*, 72 Ohio App. 55, 50 N. E. (2d) 671 (1943) (accident indemnity insurance); *Kooser v. West Penn. Rys.*, 42 Pa. D. & C. 701 (Fayette Co., 1941) (automobile accident indemnity insurance).

14. The problem has been solved in Pennsylvania where Rule 2002 (d) of the Rules of Civil Procedure provides that the real party in interest rule shall not be mandatory where a subrogee is the real party in interest. PA. RULES CIV. PROC., Rule 2002 (d), 12 PA. STAT. ANN. (Purdon, 1945). This "has not merely given unquestionable efficacy to loan agreements . . ." but actually "dispenses with the necessity of such an agreement; it permits an action by the insured, although his insurer has become subrogated to his claim." *Loan Receipt Transactions Between Insurer and Insured* (Sept. and Oct. 1945) INS. L. J. 528-532, 592-599. *Levin v. Hanson Garage, Inc.*, 44 Pa. D. & C. 21 (1942) discusses Rule 2002 (d). Moreover the loan receipt was upheld in *Kooser v. West Penn. Rys.*, 44 Pa. D. & C. 701 (Fayette Co., 1941), prior to enactment of Rule 2002 (d), and (contra to the *Meyers* case) an assignment by the insured to the insurer is valid in Pennsylvania under *Grubnau v. Centennial National Bank*, 279 Pa. 501, 124 Atl. 142 (1924).

15. "Whether such a transaction constitutes a *payment* or a *loan* by the insurer has arisen in two classes of cases: (1) where the property insured and damaged is

The loan receipt here serves no purpose other than the obvious attempt to avoid the rule of the *Meyers* case, and to uphold it would extend its use to a type of insurance situation quite different from the cases in which the courts have approved it. If the rule of the *Meyers* case does not adequately protect the parties in this business situation, legislation should be enacted to change the rule. But the use of a legal device, proper in its setting, should not be extended to a situation foreign to its nature for the purpose of thwarting the decisions of the courts.

**Juries: Qualifications and Exemptions of Jurors—Trial—Statutes**—In a federal court action against a railroad for personal injuries to a passenger, plaintiff's motion to strike jury panel on grounds that daily wage earners were deliberately and systematically excluded therefrom was denied. Petitioner brought certiorari. *Held*, (two judges dissenting)<sup>1</sup> refusal of plaintiff's motion required reversal of trial court's judgment for defendant though no prejudice to plaintiff was alleged. United States Judicial Code provides that federal court jurors shall have the same qualifications as jurors serving in the highest court of the state in which the case is tried.<sup>2</sup> California law does not include daily wage earners among those exempt from jury service.<sup>3</sup> *Thiel v. Southern Pac. Co.*, 66 Sup. Ct. 984 (1946).

The majority opinion reiterates the dicta of previous cases that the American tradition of trial by jury contemplates an impartial jury drawn from a cross section of the community.<sup>4</sup> Thus prohibited have been: categorical exclusion of negroes from jury service in the trial of a negro defendant (denial of equal protection of the law guaranteed by the Fourteenth Amendment<sup>5</sup>); the exclusion of women from a state court jury (violation of both the Nineteenth Amendment and a state law requiring selection of jurors from among all of the qualified electors<sup>6</sup>); and, selection of jurors according to political affiliation (while recognizing the discretionary powers of the courts in the drawing of jurors, the case qualifies these discretionary powers in accord with the provisions of the United States Judicial Code<sup>7</sup>). The problem of exclusion because of method of

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in the possession of a carrier (warehouseman), and (2) where, as here, such property is in the possession of the insured. . . . In the latter class of cases . . . the insurer's liability to the insured is *absolute* when the loss occurs. No shipper or other third party is involved. The insured is entitled to prompt payment without resort to a loan. The transaction is held to be a payment." *Yesek v. D. L. & W. Ry. Co.*, 176 Misc. 553, 28 N. Y. S. (2d) 35, 36 (1941).

1. Mr. Justice Murphy delivered the majority opinion. Mr. Justice Frankfurter dissented in an opinion in which Mr. Justice Reed concurred.

2. 36 STAT. 1164 (1911), 28 U. S. C. A. § 411 (1928), UNITED STATES JUDICIAL CODE § 275.

3. CALIFORNIA CODE OF CIVIL PROCEDURE § 200.

4. *Glasser v. U. S.*, 315 U. S. 60, 85 (1942); *Smith v. Texas*, 311 U. S. 128, 130 (1940).

5. *Smith v. Texas*, 311 U. S. 128 (1940); *accord*, *State v. Frazier*, 104 W. Va. 480, 140 S. E. 324 (1927). See also 36 STAT. 1165 (1911), 28 U. S. C. A. § 415 (1928), UNITED STATES JUDICIAL CODE § 278.

6. *Walter v. State*, 208 Ind. 231, 235, 195 N. E. 268 (1935); *accord*, *U. S. v. Roemig*, 52 F. Supp. 857 (D. C. N. D. Iowa 1943).

7. *U. S. v. Murphy*, 224 F. 554 (D. C. N. D. N. Y. 1915). "All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box . . . without reference to party affiliations. . . ." 36 STAT. 1164 (1911), later amended by 39 STAT. 873 (1917), 28 U. S. C. A. § 412 (1928), UNITED STATES JUDICIAL CODE § 276.

remuneration for daily labors is, however, something new in our courts. The mass exclusion of daily wage earners from jury lists was an expedient developed as a result of past experience which showed that members of this group had always been excused, when summoned, on grounds that jury duty would invoke undue hardship.<sup>8</sup> However, Mr. Justice Murphy points out that "a blanket exclusion of all daily wage earners, no matter how well intentioned, and however justified by prior actions of trial court judges, must be counted among those tendencies which undermine and weaken the institution of trial by jury."<sup>9</sup> Note that prejudice to the plaintiff, a salesman, was not shown to have resulted from this exclusion. Moreover, at least five members of the jury were members of the laboring class. Therefore, in upholding the tradition of trial by an impartial jury, the court upsets the verdict of a jury whose impartiality was not questioned. Doubtless, the sanction of such an exclusion might encourage those responsible for selection of jury panels to discriminate against other groups of low economic status. But, is this not a problem for the trial courts, or more likely, the legislature? Would it not be wiser to increase the compensation of jurors than to cast doubt upon the reliability of many previous judgments? As the dissenting opinion suggests, "to reverse a judgment free from intrinsic infirmity and perhaps to put in question other judgments based on verdicts that resulted from the same method of selecting juries reminds too much of burning the barn in order to roast the pig."<sup>10</sup>

### Monopolies—Interpretation and Construction—Anti-Trust Laws

—The three largest cigarette manufacturers in the United States were charged with violating a statute prohibiting combinations in restraint of trade and monopolization.<sup>1</sup> Evidence showed the existence of an informal agreement among defendants to regulate prices and marketing conditions of leaf tobacco and to establish uniform prices for the sale of cigarettes, in order to give defendants better purchasing positions in relation to the growers of the leaf tobacco and the manufacturers of competing low-priced cigarettes and to fight "low-price" competition in the marketing of cigarettes. There was no evidence of actual exclusion of competitors from either buying or selling markets. Defendants were convicted. Appealed and affirmed. On certiorari, *held*, judgment affirmed as actual exclusion of competitors is not necessary to the crime of "monopolization" under the Sherman Anti-Trust Act. *American Tobacco Co. et al. v. United States; R. J. Reynolds Tobacco Co. et al. v. Same; Liggett and Myers Tobacco Co. et al. v. Same*, 66 Sup. Ct. 1125 (1946).

8. See statements of Judge John C. Knox in hearing before the *House Committee on the Judiciary on H. R. 3379, 3380 and 3381*, 79th Cong., 1st Sess., Serial No. 3, June 12 and 13, 1945, p. 4. "When jurors compensation is limited to \$4 per day, and when periods of service are often protracted, thousands upon thousands of persons simply cannot afford to serve. To require them to do so is nothing less than the imposition upon them of extreme hardship." For a discussion of the general problem see Rosenwald, *Exemption From Jury Service and Challenges for Cause* (1930) 15 ST. LOUIS L. REV. 230-66, 361-89. Query whether a man losing one day's pay as a result of jury service suffers a greater hardship than does a man losing one-seventh of a week's pay.

9. Instant case at 987.

10. Instant case at 992.

1. 26 STAT. 209 (1890), 15 U. S. C. §§ 1, 2 (1940).

Under the Common Law the term "monopolize" had two meanings: 1) the exercise of a grant from the sovereign of the sole right to deal in a particular commodity,<sup>2</sup> and 2) the act of gaining control of the market in a commodity without such a grant.<sup>3</sup> The purpose of the Sherman Act was to prevent restraints of trade which would interfere with the workings of free competition and lessen the benefits accruing to the public therefrom.<sup>4</sup> From this it would appear that the concept of the term "monopolize" as used in the Statute is the latter of the common law concepts.<sup>5</sup> The Statute refers also to an attempt to monopolize<sup>6</sup> indicating that the prohibition is of the acquisition of the power, *i. e.*, the physical ability, to exclude, rather than the exercise of an acquired power. Early decisions under the Statute indicated that it was necessary that there be actual exclusion of competitors to constitute "monopolization";<sup>7</sup> "inclusion" of competitors, *i. e.*, absorption through purchase or merger, was treated as an act of "constructive exclusion."<sup>8</sup> Other courts considered the existence of an "intent to monopolize"<sup>9</sup> and

2. 4 BL. COMM. \*159. "A license or privilege allowed by the king for the sole buying and selling, making, working, or using of any thing whatsoever; whereby the subject is restrained from that liberty of manufacturing or trading which he had before."

3. STAT. 5 & 6 EDW. VI, c. 14, § 1 (1552) states that "whatsoever person or persons that shall buy or cause to be bought any merchandise, . . . before the said merchandise, . . . shall be in the market, . . . ready to be sold; or shall make any motion . . . to any person or persons, for the enhancing of the price or dearer selling of any thing or things above mentioned or else dissuade . . . any person . . . to forbear to bring or convey any of the above things rehearsed, to any market, . . . to be sold, . . . shall be deemed . . . a forestaller." The statute also condemns "regrating," *i. e.*, the buying and reselling of certain commodities within the same area and "ingrossing," *i. e.*, the purchase of certain commodities with intent to resell either within or without the realm.

4. See *United States v. Colgate & Co.*, 250 U. S. 300, 307 (1918). In the *Case of Monopolies*, 11 Co. Rep. 856, 77 Eng. Rep. 1260 (1602), the court listed three incidents which made monopolies undesirable: (1) the price of the commodity will be raised; (2) when a monopoly exists, the commodity will deteriorate as the benefit of the vendor is the prime consideration; (3) it deprives others of their trade.

5. See *Standard Oil Co. v. United States*, 221 U. S. 1, 56 (1911). "In this country also, the acts from which it was deemed there resulted a part, if not all, of the injurious consequences ascribed to monopoly, came to be referred to as a monopoly itself. In other words, here, as had been the case in England, practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and to the remedying of the evils which it produced." See also, *Lynch v. Magnavox Co.*, 94 F. (2d) 883 (C. C. A. 9th, 1938), reversing 11 F. Supp. 768 (S. D. Calif., 1935).

6. In *United States v. Whiting*, 212 Fed. 466, 478 (D. Mass. 1914), the court said that ". . . An attempt to monopolize means an attempt to get control of the industry in which the defendant is engaged 'by means which prevent other men from engaging in fair competition with him.'"

7. In *re Greene*, 52 Fed. 104 (C. C. 1892). Defendant was indicted for violation of Section 2 of the Sherman Act. Count charged that he made agreement with a purchaser that if the latter would buy his product exclusively from defendant and not sell it below a list price, defendant would pay him a rebate. Petition for a writ of habeas corpus on ground that indictment stated no cause of action. Discharge ordered on ground that defendant could not "monopolize" the trade as he could not exclude other dealers since the purchaser was not bound to buy from defendant. See *Montrose Lumber Co. v. United States*, 124 F. (2d) 573, 578 (C. C. A. 10th, 1941); Morawetz, *The Anti-Trust Act and the Supreme Court* (1910) 10 COL. L. REV. 687, 699-700.

8. *United States v. Reading Co.*, 253 U. S. 26 (1919).

9. See *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 226, n. 59 (1939); *United States v. Eastman-Kodak*, 226 Fed. 62, 80 (D. C. N. Y. 1915).

the "size" of the alleged monopolist<sup>10</sup> in determining whether the crime was being committed. In the instant case, Mr. Justice Burton has defined "monopolization" as a conspiring to acquire or maintain the power to exclude competitors provided that the conspiracy has the "power . . . to exclude actual or potential competition from the field and . . . the intent and purpose to exercise that power."<sup>11</sup> Such definition does not call for actual exclusion and is therefore significant in its recognition that there are factors which discourage the entry of new competition into a particular field but do not come under the older concept of "exclusion."<sup>12</sup> Prosecutions under the Act will probably be facilitated since mere proof of relatively concentrated economic strength within a given field of industry<sup>13</sup> coupled with evidence of the requisite intent is sufficient to bring the unit or group within the meaning of the Court's interpretation of the statutory prohibition.

**Negligence—Physicians and Surgeons—Liability of a Hospital for the Acts of Its Unlicensed Dental Intern—Plaintiff visited defendant's dental clinic where he was examined and treated by an unlicensed substitute dental interne employed in violation of the Connecticut statute.<sup>1</sup> An infection requiring surgical treatment and hospitalization followed the extraction. Expert testimony indicated that the operation of the clinic in general and the treatment by the interne in particular were either in accordance with standard practice or better.<sup>2</sup> On appeal, *held*: verdict and judgment for plaintiff set aside. In pronouncing the appellant guilty of**

10. See *United States v. Swift & Co.*, 286 U. S. 106, 116 (1931), ". . . but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past." *Contra*: *United States v. United States Steel Corp.*, 251 U. S. 417 (1919); see *United States v. International Harvester Co.*, 274 U. S. 693, 708-9 (1926).

11. Instant case at 1139.

12. Instant case at 1133. Evidence that defendants' combined advertising bill amounted to \$40 millions per year for the years 1937, 1938 and 1939 was introduced. Such large expenditures are extremely significant as indicating (1) the importance and utility of advertising in maintaining (and possibly in gaining) a dominant market position, (2) the necessity of possession of very large amounts of capital funds in order to enter a field where such powerful opposition exists. It is unlikely in the market for this particular commodity, that there would be any challenge from a newcomer, even aided by technological improvements denied to the existing producers which might considerably reduce costs, unless such newcomer had sufficient capital funds to wage economic warfare with the existing producers. This, of course, would not apply to the possibility of slow growth by existing competitors in the field. With such strength existing it is questionable whether the court need have included the element of "intent" since the mere existence of "power" may be a strong deterrent to the entry of newer and smaller aggregations of capital into a field of industry. See *United States v. Aluminum Company of America*, 148 F. (2d) 416, 431 (C. C. A. 2d, 1945). (This case, dealing with the power of a single producer in the aluminum ingot field, was relied upon considerably by this court in its decision.)

13. There is no precise "percentage of production" test that can be applied in determining relatively concentrated economic strength. Why should not the test be the ability independently to motivate prices of raw material, finished product, or service involved or to restrain competition therein? It has been suggested that "the test of monopolizing could always be framed with respect to the power to protect the public interest possessed by those not parties to the combination. Such a test would, however, be extremely difficult to apply." Government Brief, instant case, p. 35. On the general problem, see *LYNCH, THE CONCENTRATION OF ECONOMIC POWER* (1946).

1. CONN. GEN. STAT. (Rev. 1930) §§ 2802, 2804, 2807, 2812, 2816, 6568; CONN. GEN. STAT. (Supp. 1943) § 553g.

2. Testimony of Dr. Bert G. Anderson, Official Court Record No. 2771, pp. 85, 100, 101.



negligence in employing an unlicensed dental interne,<sup>3</sup> this court reiterates the rule that violation of a standard of conduct imposed by statute and intended to protect others from injury constitutes negligence per se.<sup>4</sup> However, the court concluded that there was no negligence by the employee imputable to the employer. *Haliburton v. General Hospital Society of Connecticut*, 48 A. (2d) 261 (Conn., 1946).

This case is of interest primarily for two reasons: First, after finding the defendant negligent in hiring the interne, the court still denied recovery;<sup>5</sup> and secondly, because of the discussion of the standard of care to which this interne was subjected. To what standard of care should such a practitioner be required to conform in order to refute the allegation of negligence? Is he to be judged according to the standards applicable to practicing physicians,<sup>6</sup> or is he to be judged by those standards

3. To legally engage in the practice of medicine, the person must meet the requirements of the statute regulating the practice of medicine and must obtain a license as therein provided. *Mabrey v. State Board of Examiners in Optometry*, 190 Ga. 751, 10 S. E. (2d) 740 (1940).

4. 2 RESTATEMENT, TORTS (1934) § 286; 38 AM. JUR., Negligence, § 158, and cases cited n. 20, p. 827 and n. 21, p. 829; PROSSER, HANDBOOK OF THE LAW OF TORTS (1941) § 36, p. 238: "Modern licensing statutes are interpreted as establishing a minimum standard of knowledge and skill for the entire medical profession, for lack of which anyone who practices medicine will be held liable." See also *id.* at § 39, pp. 264, 274, in which the author accepts and discusses the RESTATEMENT view.

5. Some cases hold hospitals liable only for injuries resulting from the improper or negligent selection of employees. Instant case at 262 and citations therein; *Rosane v. Senger*, 112 Colo. 363, 149 P. (2d) 372, 374 (1944). The leading English case reiterating this doctrine is *Hillyer v. St. Bartholomew's Hospital* [1909] 2 K. B. 820, which held hospital authorities liable for failure to use due care in assuring itself of the professional competence of doctors and nurses whom it employs. *Evans v. Liverpool Corp.* [1906] 1 K. B. 160, adopts a negative approach to this problem with substantially the same result, holding that managers of a hospital are only bound to use reasonable care in selecting competent medical men and women for their hospitals and that they are not liable for the negligence of these employees once they have been thus appointed. See also *Scott, Tort Liability of Hospitals* (1943) 17 TENN. L. REV. 838; Note (1938) 48 YALE L. J. 81; (1935) AUST. L. J. 376; (1933) 97 JUST. P. 296. The above middle view is that advocated by the court in the instant case. Two other views adopted by other courts, while more extreme than the above, are worthy of note. Some courts fail to decree liability of the hospital for the negligence of doctors or nurses with respect to any matter concerning the patient's medical care and attention. *Steinert v. Brunswick Home, Inc.*, 259 App. Div. 1018, 20 N. Y. S. (2d) 459 (1940), *appeal denied*, 284 N. Y. 822, 31 N. E. (2d) 517 (1940). *Contra: Hendrickson v. Hodkin*, 250 App. Div. 619, 294 N. Y. Supp. 982 (1937), *rev'd on other grounds*, 276 N. Y. 252, 11 N. E. (2d) 899 (1938), in which the court held that the hospital owed the patient the duty of forbidding a charlatan the privilege of hospital practice, although the patient himself retained the layman for the "cure"; *Kamps v. Crown*, 251 App. Div. 849, 296 N. Y. Supp. 776 (1937). The other extreme view imposes liability upon the hospital regardless of the competency of the employee whose negligent act caused the injury to the patient. *South Highlands Infirmary v. Galloway*, 233 Ala. 276, 171 So. 250 (1936); *Rice v. California Lutheran Hospital*, 27 Cal. (2d) 296, 163 P. (2d) 860 (1945); *City of Miami v. Oates*, 152 Fla. 21, 10 S. (2d) 721 (1942); *Treptau v. Behrens Spa*, 247 Wis. 438, 20 N. W. (2d) 108 (1945). When this rather strict liability is imposed it generally attaches to hospitals conducted for private gain. Rarely have charitable hospitals been held to so high a degree of care, although the trend seems to be toward the abolition of this distinction.

6. *Blankenship v. Baptist Memorial Hospital*, 26 Tenn. App. 131, 168 S. W. (2d) 491, 495 (1942) and cases therein cited. "A physician or surgeon must possess that reasonable degree of learning, skill and experience which ordinarily is possessed by others of his profession; . . . a physician is bound to bestow such reasonable and ordinary care, skill and diligence as physicians and surgeons in the same neighborhood, in the same general line of practice ordinarily have and exercise in like cases. Physicians and surgeons must be allowed a wide range in the exercise of their judgment and discretion."; see 2 RESTATEMENT, TORTS § 299d.

applicable to a layman who undertakes to aid an injured person?<sup>7</sup> In *Thomas v. Studio Amusements, Inc.*,<sup>8</sup> this precise issue was presented to the court.<sup>9</sup> The defendant falsely represented himself to the plaintiff as a medical doctor.<sup>10</sup> The court held that this "is not a question of what a qualified medical practitioner would have done under the circumstances, but is rather a question of whether Berman under like circumstances should have assumed the role and duties of a doctor. If he did assume such a role and negligently caused aggravation of appellant's injuries thereby, manifestly he could not avail himself of the defense of having used the standard of care and skill usually possessed or rendered by physicians in the locality. Such a defense is peculiarly the privilege of the medical profession." This case seems to be the sole authority for the proposition quoted.<sup>11</sup> In the instant case, the interne was permitted the defense of being held only to the degree of care and skill normal to the average member of the profession. Although the court might conceivably have arrived at a contrary decision by analogy to the case of *Thomas v. Studio Amusements, Inc.*, the result reached seems proper, for was not this interne subjected to a rigid test of standard of care, one that was above his position? If this unlicensed interne could be said to have acted as a full-fledged practitioner who under like circumstances would not have been deemed negligent, why should the interne be considered negligent? Of course such a line of reasoning might open the gates to the avoidance of the state licensing system, so that only *after* damage was done would a person be held liable, as contrasted with the policy of the licensing boards whereby it is sought to test the qualifications of a person *before* he undertakes to treat members of the public.

**Negligence—Res Ipsa Loquitur—Control of Instrumentality Causing Injury**—Plaintiff sued defendant riding academy for injuries sustained in a fall from a horse. Plaintiff proved that defendant's servant saddled the horse, and that she had ridden for one half hour without difficulty when the saddle suddenly slipped, causing the fall. Plaintiff further proved that she was in no way negligent. In overruling defendant's contention that the vital element of control was lacking, *held*, defendant had "constructive control" or "right of control" over the saddle, sufficient to invoke *res ipsa loquitur*. *Rafter v. Dubrock's Riding Academy*, 171 P. (2d) 459 (D. C. of Appeal, Cal., 1946).

The doctrine of *res ipsa loquitur* has four conditions: 1) the accident must be of a kind which ordinarily does not occur in the absence of some-

7. "If one undertakes to afford another relief, he is bound to act with reasonable prudence and care to the end that if his effort be unavailing it shall at least not increase the injury." *Carey v. Davis*, 190 Iowa 720, 180 N. W. 889 (1921); *Owl Drug Co. v. Crandall*, 52 Ariz. 322, 80 P. (2d) 952 (1938).

8. 50 Cal. App. (2d) 538, 123 P. (2d) 552 (1920).

9. Here plaintiff, a patron of the defendant roller skating rink, fell and sustained a broken hip, which injury improper handling by defendant's employee was alleged to have aggravated.

10. The evidence indicated that the "treatment" consisted of stretching, pulling and rubbing the patron's leg and pounding her thighs; and that he assisted her to her feet and helped her walk to her car.

11. The court failed to cite any cases or articles supporting its conclusion, and the research by the writer failed to disclose any authority therefor. Neither the cases of *Owl Drug Co. v. Crandall* nor *Carey v. Davis*, both *supra* note 7, can be considered precedent here. In both of these cases there was neither a representation of skill nor a representation by defendant that he was a member of the medical profession.

one's negligence;<sup>1</sup> 2) it must be caused by an instrumentality within the exclusive control or management of the defendant;<sup>2</sup> 3) it must not have been due to any voluntary action or contribution on the part of the plaintiff;<sup>3</sup> 4) knowledge of its causes must appear more accessible to the defendant than to the plaintiff.<sup>4</sup> Some authorities have adhered literally to the requirement of exclusive control, and have refused to apply *res ipsa loquitur* when the instrumentality causing the injury was not within defendant's exclusive control at the time of the injury,<sup>5</sup> because generally only when the defendant has such exclusive control will knowledge of the causes of the injury be more accessible to the defendant than to the plaintiff.<sup>6</sup> On the other hand, this requirement has been held necessary only to exclude the possibility that the injury was caused by intervening acts of the plaintiff or other persons,<sup>7</sup> and therefore once the plaintiff has proved no such intervening cause, the purpose of the requirement is satisfied.<sup>8</sup> The instant case holds "constructive control" or "right of control" sufficient compliance with the requirement.<sup>9</sup> In effect, this means that

1. PROSSER, HANDBOOK OF THE LAW OF TORTS (1st ed. 1941) § 43, 295.

2. *San Juan Light and Transit Co. v. Requenna*, 224 U. S. 89 (1911); PROSSER, *op. cit. supra* note 1, § 43, 295; Carpenter, *The Doctrine of Res Ipsa Loquitur in California* (1937) 10 So. CALIF. L. REV. 169.

3. *San Juan Light and Transit Co. v. Requenna*, 224 U. S. 89 (1911).

4. HARPER, A TREATISE ON THE LAW OF TORTS (1st ed. 1933) § 77, 183; 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2509, 498. *But see* Prosser, *Procedural Effect of Res Ipsa Loquitur* (1936) 20 MINN. L. REV. 241, 242, 243.

5. *McNamara v. Boston & M. R. R.*, 202 Mass. 491, 89 N. E. 131 (1909) (where plaintiff was injured when the roof of defendant's freight car blew off); *Sullivan v. Minneapolis St. Ry.*, 161 Minn. 45, 200 N. W. 922 (1924) (where plaintiff was injured when defendant's street car made an emergency stop to avoid a collision with a truck); *Kilgore v. Shepard & Co.*, 52 R. I. 151, 158 Atl. 720 (1932) (where plaintiff, a customer in defendant's store, was injured when a chair in which she was sitting collapsed). *But see* PROSSER, *supra* note 4 at 241-242.

6. *Grugan v. Shore Hotels Finance & Exchange Corp.*, 126 N. J. L. 257, 18 A. (2d) 29 (1941); *George Foltz, Inc. v. City of N. Y.*, 287 N. Y. 108, 38 N. E. (2d) 455 (1941); *Stanolind Oil & Gas Co. v. Bunce*, 51 Wyo. 1, 62 P. (2d) 1297 (1936); HARPER, *op. cit. supra* note 4, § 77, 183; 5 WIGMORE, *op. cit. supra* note 4, § 2509, 498.

7. "The doctrine is not invoked when there is divided responsibility or where the accident is due in part to the acts of a third party over whom the defendant had no control, or where the injuring agency is under the control and management of the plaintiff." Carpenter, *Doctrine of Res Ipsa Loquitur* (1934) 1 U. OF CHI. L. REV. 519, 521.

8. *Jump v. Ensign-Bickford Co.*, 117 Conn. 103, 167 Atl. 90 (1933); *Payne v. Rome Coca-Cola Bottling Co.*, 10 Ga. App. 762, 76 S. E. 1087 (1912); *Goldman & Freiman v. Sindell*, 140 Md. 468, 117 Atl. 866 (1922); PROSSER, *op. cit. supra* note 1, § 43, 300.

9. "Many authorities state that the happening of the accident does not speak for itself where it took place sometime after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident." *Escala v. Coca-Cola Bottling Works*, 24 Cal. (2d) 453, 150 P. (2d) 436, 438 (1944) (where a Coca-Cola bottle exploded in plaintiff's hand); *accord*, *Ybarra v. Spangard*, 25 Cal. (2d) 486, 154 P. (2d) 687 (1945) (where an unconscious patient undergoing medical treatment sustained injuries to a part of his body not subject to treatment); *Metz v. Southern Pac. Co.*, 51 Cal. App. (2d) 260, 124 P. (2d) 670 (1942) (where an employee of defendant railroad was killed when a handcart operated by the deceased, but supplied and serviced by defendant, jumped the track); *Van Horn v. Pacific Refining & Roofing Co.*, 27 Cal. App. 105, 148 Pac. 951 (1915) (where an employee of an independent contractor hired by plaintiff recovered for injuries sustained by the bursting of a steam pipe located on plaintiff's premises). *Contra*: *Scellars v. Universal Service Everywhere*, 68 Cal. App. 252, 228 Pac. 879 (1924) (where plaintiff's automobile was damaged while on defendant's car washing rack); *White v. Spreckels*, 10 Cal. App. 287, 101 Pac. 920 (1909) (where a steam heating radiator, installed and maintained by defendant, but situated in a room occupied by plaintiff, exploded).

defendant was in exclusive and actual control at the time of the negligent act, *i. e.*, the saddling, and that the condition of the saddle has not been changed since leaving the defendant's possession.<sup>10</sup> In other jurisdictions, too, the sufficiency of control of the injuring instrumentality by the defendant at the time of the negligent act,<sup>11</sup> or "right of control" at the time of injury,<sup>12</sup> has been upheld. The instant case intimates that, in a factual situation in which the plaintiff has been in actual control of the instrumentality for some time previous to the injury, the fiction of "constructive control" is justified, because, otherwise the purpose of *res ipsa loquitur* would be defeated.<sup>13</sup> But this would appear to be an unsound extension,<sup>14</sup> and one which, if carried to its logical conclusion, would authorize the application of *res ipsa loquitur* in a situation where a plaintiff merely proved that he was injured, that he was in no way negligent, and that the accident was of a kind which did not ordinarily occur in the absence of someone's negligence. This would create an almost irrefutable inference of negligence in the defendant. If such be the desired result, it seems unreasonable to continue to render lip service to the requirement that the defendant be in exclusive control of the injuring instrumentality at the time of the injury, which requirement, in effect, has become a nullity.

**Wills—Life Estate With Power to Consume Principal—Life Beneficiary's Exercise of Discretion—**Testator's will provided for establishment of a trust which would . . . "during her lifetime pay . . . to the use of my beloved wife . . . the income thereof monthly, together with as much of the principal or corpus of my estate as she may deem necessary for her maintenance, comfort and well-being (for which she shall not be required to make or file any account) and upon her death to pay the remainder . . ." to others. *Held*, that a written statement by the widow as to the amount of the corpus necessary for her maintenance, comfort and

10. Instant case at 462.

11. *Payne v. Rome Coca-Cola Bottling Co.*, 10 Ga. App. 762, 73 S. E. 1087 (1912) (recovery against bottler permitted although defective bottle was purchased from a retailer); *Goldman & Freiman v. Sindell*, 140 Md. 488, 117 Atl. 866 (1922) (where recovery against the manufacturer was upheld when plaintiff was injured by broken glass present in a bottled beverage purchased from a retailer); *Petersen v. Minn. Power & Light Co.*, 207 Minn. 387, 291 N. W. 705 (1940) (where plaintiff was injured by a charge of electricity while she was operating an electric stove, installed and supplied with power by defendant); *Benkendorfer v. Garret*, 23 Tex. L. R. 88, 143 S. W. (2d) 1020 (1940) (where a retailer recovered from bottler for injuries resulting from the explosion of a bottled beverage); (1937) 6 FORDHAM L. REV. 483.

12. *Crump v. Montgomery Ward & Co.*, 313 Ill. App. 151, 39 N. E. (2d) 411 (1942) (where plaintiff was injured by a mechanical door in defendant's store); *McCloskey v. Koplar*, 329 Mo. 527, 46 S. W. (2d) 557 (1932) (where a detached radiator fell over and injured plaintiff, a patron of defendant's theatre).

13. ". . . it would be difficult to imagine a case where the appliance causing the accident would be so immured as to make it impossible for any person but its owner or operator to have access to it. . . . The rule . . . to the effect that the exclusive control and management of the appliance causing the injury must be shown to have been in the defendant, must be taken to refer to the right of such control; otherwise . . . the doctrine of *res ipsa loquitur* could seldom if ever be given application." *Van Horn v. Pacific Refining & Roofing Co.*, 27 Cal. App. 105, 148 Pac. 951 (1915), cited note 9.

14. Only one case has been found in which *res ipsa loquitur* has been applied to an analogous factual situation. In *McComas v. Al. G. Barnes Shows*, 215 Cal. 685, 12 P. (2d) 630 (1932) plaintiff was injured when the howdah on an elephant's back slipped off. However the howdah had been secured some hours before, and in the interim, the elephant had run away, had been severely beaten on recapture, and defendant had failed to recheck the howdah prior to plaintiff's mounting.

well-being imported an exercise of good faith and honest judgment and could not be questioned. *In Re Woollard's Will*, 295 N. Y. 390, 68 N. E. (2d) 181 (1946), *modifying and affirming* 269 App. Div. 866, 57 N. Y. S. (2d) 1 (1945).

This decision is open to question on two grounds: that it appears to violate the intent of the testator by converting into an absolute power of disposition of the principal that which he intended to be a life estate with a qualified power of disposition based on necessity;<sup>1</sup> and that it apparently substitutes the mere execution of a written statement for a bona fide exercise of judgment and discretion implied in the words "deem necessary."<sup>2</sup> It has been generally held that where a will gives a life interest coupled with a right to invade or dispose of the corpus for the support and maintenance of the life beneficiary, with remainder over to others, the life beneficiary may encroach on any or all of the principal necessary for his support and maintenance provided it is done in good faith<sup>3</sup> and not for the purpose of defrauding the remaindermen.<sup>4</sup> He cannot use the corpus for another purpose,<sup>5</sup> nor give it away,<sup>6</sup> nor waste it,<sup>7</sup> nor devise it.<sup>8</sup> One writer describes the life beneficiary in such case as a *quasi* trustee for the remaindermen, who is subject to injunction against injuring the inheritance by recklessly squandering the estate.<sup>9</sup> He is treated as a trustee, whom the courts will control in the exercise of his power if he is guilty of an abuse of his discretion,<sup>10</sup> *i. e.*, dishonest action,<sup>11</sup> failure to use his judg-

1. This thought is aptly expressed in *Presbyterian Church v. Mize*, 181 Ky. 567, 573, 205 S. W. 674, 676 (1918):

"That this power is not unlimited is plain. There would be no reason for making a devise over of the property not disposed of at the death of the life tenant if the life tenant had an unlimited power to dispose of it at such time and upon such occasion as he should choose. Neither would there exist any reason for the testatrix giving a life estate to her husband at all. . . ."

2. "Deemed" means considered, determined or adjudged." *State ex rel. Sinko v. District Court*, 64 Mont. 181, 186, 208 Pac. 952, 955 (1922). "'Deem' does not signify an arbitrary exercise of will, but a deliberate exercise of judgment." *State v. Cohen*, 73 N. H. 543, 547, 63 Atl. 928, 930 (1906).

3. *Shapleigh v. Shapleigh*, 69 N. H. 577, 44 Atl. 107 (1899); *Matthews v. Capshaw*, 109 Tenn. 480, 72 S. W. 964 (1903).

4. "In appropriating the estate as directed, she must act honestly and fairly. . . . Generally it may be said as long as she does not deplete the estate for the mere purpose of defeating the testator's intention or of preferring certain heirs or beneficiaries, courts will be slow to condemn expenditure as being contrary to the power lodged in the widow." *Zumbro v. Zumbro*, 69 Pa. Super. 600, 603 (1918). *See also* *Bevans v. Murray*, 251 Ill. 603, 614, 96 N. E. 546, 550 (1911); *In re Robinson's Will*, 101 Vt. 464, 470, 144 Atl. 457, 459 (1929).

5. *Homans v. Foster*, 232 Mass. 4, 121 N. E. 417 (1919) (right to convey to second wife denied); *In re Watson's Estate*, 241 Pa. 271, 88 Atl. 433 (1913) (support of relatives not authorized). *See also* *Clore v. Clore*, 184 Ky. 83, 211 S. W. 208 (1919).

6. *Baldwin v. Morford*, 117 Iowa 72, 90 N. W. 487 (1902); *Richards v. Morrison*, 101 Me. 424, 64 Atl. 768 (1906).

7. *Belton v. Myers*, 86 Ind. App. 35, 154 N. E. 695 (1926); *see* *Ballinger v. Bar-tolett*, 3 N. J. Misc. 80, 127 Atl. 671 (1925).

8. *Reed v. Creamer*, 118 Me. 317, 108 Atl. 82 (1919); *Peck v. Smith*, 183 App. Div. 336, 170 N. Y. Supp. 500 (1918); *Tyson's Estate*, 191 Pa. 218, 43 Atl. 131 (1899).

9. 2 PERRY, TRUSTS AND TRUSTEES (7th ed. 1929) § 540. *See* *Mallett v. Hall*, 129 Me. 148, 150 Atl. 531 (1930).

10. RESTATEMENT, TRUSTS (1935) § 187; 2 SCOTT, THE LAW OF TRUSTS (ed. 1939) §§ 185, 187.

11. *Keating v. Keating*, 182 Iowa 1056, 165 N. W. 74 (1917); *In re Smith* (1896) 1 Ch. 71.

ment,<sup>12</sup> or actions beyond the bounds of reasonable judgment.<sup>13</sup> While it is true that the mere exercise of poor judgment is not sufficient to cause intervention by the court,<sup>14</sup> there have been extremely few cases wherein it has been held that a life beneficiary is to be the sole judge of his needs and that his exercise of discretion is not subject to judicial review.<sup>15</sup> Indeed, in these cases the testator employed words such as "wish," "choose" or "think expedient" rather than "deem necessary." Even New York courts have in the past maintained that the exercise of discretion must be in good faith, implying that it is reviewable if challenged.<sup>16</sup> While the evidence in the *Woollard* case<sup>17</sup> conveys no impression that a fraud was being perpetrated upon the remaindermen by the widow, the majority's decision<sup>18</sup> renders it easy to commit such a fraud by the mere filing of a statement of necessity. It is unlikely that the court intended such a result. It appears quite possible that the court, presented with a different factual situation, might well interpret a similarly worded will to require filing of a simple statement of necessity *made in good faith*, thereby leaving the exercise of discretion open to judicial review.

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12. *Coker v. Coker*, 208 Ala. 354, 94 So. 566 (1922); *Manning v. Sheehan*, 75 Misc. 374, 133 N. Y. Supp. 1006 (1911).

13. *Matter of Clark*, 254 App. Div. 932, 5 N. Y. S. (2d) 769 (1938), *modified* 280 N. Y. 155, 19 N. E. (2d) 1001 (1939); *Stallard v. Johnson*, 189 Okla. 376, 116 P. (2d) 965 (1941).

14. *Matthews v. Capshaw*, 109 Tenn. 480, 72 S. W. 964 (1903) (sale by widow under mistaken belief of necessity held valid); 2 SCOTT, *THE LAW OF TRUSTS* (ed. 1939) § 187.

15. *Cain v. Cain*, 127 Ala. 440, 29 So. 846 (1900) (will gave power to "sell and convey any property she may choose for her support or comfort, as she may see proper"); *Hosman v. Willett*, 32 Ky. L. Rep. 906, 107 S. W. 334 (1908) (will gave sister and niece property "to use or sell in any way they may wish for their support"); *Dodge v. Moore*, 100 Mass. 335 (1868) (will gave widow authority to sell property "whenever she may think it expedient").

16. *Re Briggs' Will*, 180 App. Div. 752, 168 N. Y. Supp. 597 (1917), *modified* 223 N. Y. 677, 119 N. E. 1032 (1918), on other grounds (Court may not overrule beneficiary's honest judgment, but may require an honest determination by him. "Arbitrarily or willfully saying that he deems it 'necessary and proper' has no force."); *Swarthout v. Ranier*, 143 N. Y. 499, 38 N. E. 726 (1894), *aff'g*. 67 Hun. 241, 22 N. Y. Supp. 198 (1893) (Burden of showing wife did not need the corpus rested upon remaindermen).

17. The circumstances are outlined in the dissenting opinion of Hill, P. J., *In re Woollard's Estate*, 269 App. Div. 866, 57 N. Y. S. (2d) 1 (1945).

18. This was a 4-2 decision, Lewis and Dye, JJ., dissenting.